United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

406

JOINT APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

21819

~~No. 21,189~~

SECRETARY OF DEFENSE,

Appellant,

v.

LE KHAC BONG,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Washington, D. C. - THIEL PRESS - 202 - 393-0625

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LE KHAC BONG
2106 F Street, N. W.,
Washington, D. C.

Plaintiff

v. Civil Action No. 2047-66

SECRETARY OF DEFENSE
Washington, D. C.

Defendant

COMPLAINT

(DECLARATORY JUDGMENT - REVIEW OF REFUSAL OF SECRETARY OF DEFENSE TO EXERCISE DISCRETION)

The plaintiff respectfully alleges:

1. This is an action for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review under the Administrative Procedure Act (5 U.S.C. 1009).

2. Plaintiff, Le Khac Bong, is a native and citizen of Viet Nam who was admitted to the United States as an exchange visitor on September 6, 1960 and now resides in the District of Columbia. Plaintiff's permission to remain in the United States expired on December 26, 1965.

3. Defendant is the Secretary of Defense. He is empowered by Section 109(c) of the Act of September 21, 1961, 75 Stat. 535, 22 U.S.C. 2451, to request the Secretary of State to recommend that the Attorney General find it in the public interest to permit specified persons who have been admitted to the United States as exchange visitors to apply for permanent residence without first being required to reside abroad for a period of two years.

4. Plaintiff is employed as an instructor in the Vietnamese language for American Military personnel by the Defense Language Institute of the Department of Defense. On January 25, 1966, the Chairman of the Far East Division of the Defense Language Institute submitted a memorandum to the Commanding Officer of the Institute setting forth the "desperate need" of that agency for the plaintiff's services, as follows:

1. DLIEC is desperately in need of Vietnamese instructors, especially those who can speak South Vietnamese. We have made numerous inquiries and contacted various agencies in search of qualified Vietnamese teachers. None was available because they were in great demand. It was with extreme difficulty that we finally found Mr. Le-Khac Bong who is not only a native of South Vn, but also a highly qualified teacher.

2. Mr. Bong posseses good academic background. His education includes Baccalaureate, 1952 (South VN): post-graduate studies — law and literature, 1952-54 (University of Montpellier, France); Faculty of Letters — literature, 1955-56 (Saigon University); education and linguistics, 1960-63 (Teachers College, Columbia University). We only offer him GS7-1. With such a modest salary DLIEC can hardly hire a better education person. Therefore, we can not afford to lose him.

3. In regard to professional qualifications, Mr. Bong's are more than adequate to meet our instructor's requirements. His past teaching and working experiences in other schools and institutions are very valuable to DLIEC. He taught Vietnamese, English and French at Vo Tanh College, 1957-60 in South VN. At FSI he taught Vietnamese language from Apr. 1963 to June 1964. He also was a Vietnamese teacher at Sanz School of Languages. In 1964 Mr. Bong worked for the Voice of America as an announcer and translator. He also passed the examination at Joint Publications Research Service which qualified him as a translator from Vietnamese and French into English.

The last mentioned exam alone proves that his command of both Vietnamese and English (besides French) is excellent. Armed with such professional capabilities, Mr. Bong is indeed a hard-to-get addition to the Vietnamese faculty of DLIEC.

4. As far as classroom performance is concerned, Mr. Bong conducts his classes in a superb manner. He is versatile, conscientious and well versed in the employment of good and modern teaching methodology. His students like his personality and deeply appreciate his teaching techniques.

5. Another very important factor is that if DLIEC moves to El Paso, we will definitely lose several Vietnamese instructors who have decided to remain in the Washington area. In fact a VN lady teacher already resigned last month on the ground that she did not want to go to Texas. Since Mr. Bong desires to move with our school to El Paso, we strongly urge that this intelligent, young and able VN instructor be invited to remain in the United States so that DLIEC can be benefited by his invaluable services.

6. Furthermore, Mr. Bong is highly recommended by his colleagues who know him well. It is assured that his devotion to his profession and his cooperation with this school will bring greater success to the Vn-language training of our military personnel at DLIEC.

5. Thereafter the Defense Language Institute requested the Department of Defense, through the Office of the Director of Defense Research and Engineering, to initiate a request for a waiver of the foreign residence requirement which bars plaintiff from applying for permanent residence in the United States.

6. Defendant, acting through the Director of Defense Research and Engineering, has arbitrarily refused to exercise his independent discretion to determine whether to request the Secretary of State to recommend the waiver of the foreign residence requirement for the plaintiff; namely,

(a) Defendant refused to request the Secretary of State to to recommend the necessary waiver;

(b) In his determination not to request that the Secretary of State recommend a waiver of the foreign residence requirement for the plaintiff, defendant found that there is an urgent need by the Department of Defense for Vietnamese language instructors, but found that he was precluded from making the request by reason of an Interagency Agreement (Foreign Affairs Manual Circular No. 292), to which the Department of Defense is signatory. That agreement requires that prior to making a request to the Secretary of State, an agency subordinate to the Secretary of State, namely, the Agency for International Development, must first concur in the making of the request.

(c) The Agency for International Development has refused to give its concurrence to the Department of Defense for such a request. As stated grounds for its refusal, The Agency for International Development declared that its decision is based upon the purpose of the Mutual Educational and cultural Exchange Act, that is, "that the training received in the United States (by the plaintiff) should be utilized to help fill the critical gap in skilled manpower in the visitor's country and not to be used as a means of obtaining permanent residence and employment in the United States."

(d) In his determination not to request the Secretary of State to recommend a waiver for the plaintiff, defendant also relied upon his failure to obtain a concurrence to the request from the Vietnamese Government.

(e) The Vietnamese Government has attempted to obtain the return of the plaintiff to Viet Nam and has opposed any action by the Department of Defense to permit the plaintiff to remain in the United States because the plaintiff has publicly opposed the military dictatorship which exists in Viet Nam. According to plaintiff's information and belief, that government has determined to subject him to persecution upon his return to Viet Nam. In 1959 and 1960, plaintiff was subjected to harassment and removal from his position as teacher by the Vietnamese authorities because he had criticized the Vietnamese govern-

ment for failure to provide social reforms. In 1964, while plaintiff was in the United States, the Vietnamese government assigned Major Nguyen Ngoc Thiet to conduct a secret investigation of the plaintiff's associations, opinions, statements and activities in the United States. The Vietnamese Embassy has refused to renew the plaintiff's passport except for return to Viet Nam. Plaintiff is a Buddhist and a supporter of efforts to establish civilian controlled, democratic government in Viet Nam and to restore peace to that country. According to plaintiff's information and belief, the present military dictatorship in South Viet Nam is opposed to the establishment of either a democratic or a civilian government and has publicly declared its purpose to expand the present hostilities by waging war in North Viet Nam. By reason of the plaintiff's opposition to the policies of the South Vietnamese government, he would be subject to punishment and imprisonment for a period up to five years under Article 1(b) of Decree Law 004/65, proclaimed by the Chief of State of the Vietnamese government on May 17, 1965 which makes punishable:

> "All moves which weaken the national anti-Communist effort and are harmful to the anti-Communist struggle of the people and the Armed Forces. All plots and actions under the false name of peace and neutrality according to a Communist policy and similar plots and actions are considered as belonging to the category of such moves as mentioned above."

7. The criterion relied upon by the Agency for International Development for refusing to grant its concurrence is not related to the defendant's statutory function to determine whether the Department of Defense should make a request for a recommendation for a waiver for the plaintif as an "interested United States Government Agency" pursuant to 22 U.S.C. 2451.

8. The basis for the decision of the Vietnamese government to oppose plaintiff's residence in the United States is not related to the defendant's statutory function as set forth in paragraph 7.

WHEREFORE, plaintiff prays:

(a) For a judgment declaring that the Secretary of Defense is required to exercise his independent discretion in determining whether to request the Secretary of State to recommend that the plaintiff be permitted to apply for permanent residence in the United States to be employed as an instructor in the Vietnamese language by the Defense Language Institute.

(b) For a judgment declaring that The Interagency Agreement between the Department of Defense and the Agency for International Development is in violation of the provisions of Mutual Educational and Cultural Exchange Act of 1961.

(c) For a judgment declaring that in the exercise of such discretion that the Secretary of Defense should exclude from his determination any factors relating to the policies and attitudes of the Agency for International Development or to the policies and attitudes of the Vietnamese government.

(d) For such other and further relief as may be appropriate.

/s/ Le Khac Bong, Plaintiff

WASSERMAN & CARLINER

/s/ David Carliner
Attorneys for Plaintiff

[Filed June 2, 1967]

[Caption omitted in printing]

MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT.

Defendant, by his attorney, the United States Attorney for the District of Columbia, respectfully moves the Court to dismiss this action for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, because the matter in question is committed by law to the unreviewable discretion of the defendant and plaintiff lacks standing to sue.

In the alternative, defendant moves the Court to grant summary judgment in its favor, on the ground that there is no genuine issue of material fact and defendant is entitled to a judgment as a matter of law.

In support of this motion, defendant files herewith its Exhibits 1-18.

/s/ David G. Bress
United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Nathan Dodell
Assistant United States Attorney

[Certificate of Service]

[Caption omitted in printing]

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. Plaintiff, Le Khac Bong, was born on March 17, 1932 in South Vietnam.

2. From 1957 to 1960, plaintiff was employed by the Department of Natural Education of the Government of South Vietnam, as a language teacher.

3. In 1960, plaintiff applied to be a participant in an Exchange Program of the International Cooperation Administration (ICA), now the Agency for International Development. The Government of Vietnam selected him for participation in the program, which was for the expansion and improvement of secondary English education in Vietnam. Plaintiff and two other participants in the program were to study in the United States.

4. The program contemplated that, "upon their return from their studies abroad, the participants will teach English in Secondary school or teacher training institutions." The Department of National Education "agreed to employ the participants, upon their return, in their current positions or higher ones, if such is deemed feasible." The participants signed contracts to serve with the Department of National Education for ten years.

5. Plaintiff, who entered this country in September, 1960, for his part under the program studied at Teacher's College, Columbia University, New York, under the sponsorship of AID.

6. During the course of considering the question whether a waiver request should be made, Defense Department officials obtained the following information:

In 1963, Columbia dropped plaintiff as a student for unsatisfactory performance. As a result, AID and the Vietnamese Embassy tried to get plaintiff to return to Vietnam. However, he married a United States citizen. He then asked to remain in this country until the birth of the child whom he and his wife were expecting. AID and the Embassy of Vietnam agreed, on compassionate grounds, to let plaintiff remain here at his own expense until the baby is born.

7. Plaintiff obtained employment with the Department of State's Foreign Service Institute as an instructor. He worked there from April, 1963 to June, 1964. During this period his son was born. Defense Department officials were informed that plaintiff had marital difficulties and difficulties with creditors, which created problems for the Foreign Service Institute, which found him to be generally difficult to supervise, and also found him irregular about attendance. For these reasons, the Institute informed plaintiff of its intention to terminate him; whereupon he resigned.[1] Plaintiff was employed by the Voice of America until December, 1964, and thereafter had various temporary positions until the end of 1965.

8. Plaintiff filed an application with the Immigration and Naturalization Service under Section 212(e) of the Immigration and Nationality Act for a waiver of the two-year foreign residence requirement

---

[1]There is also a statement filed herein as part of plaintiff's employment records, from a person who had been listed as a reference by plaintiff, and who states that she had been a supervisor of plaintiff at the Foreign Service Institute for six months and an acquaintance for two years. This letter speaks favorably of plaintiff.

on the ground that his departure from this country would impose exceptional hardship upon his United States citizen wife. On August 16, 1965, the Immigration and Naturalization Service informed plaintiff by letter of its denial of his application. The letter pointed out that plaintiff's wife had left him eight months earlier and was no longer dependent upon him, but that, additionally, the strict demands of the statute had not, in any event, been met in his case. He had failed to establish exceptional hardship.

9. On January 18, 1966, plaintiff received an appointment with the Department of the Army in the Defense Language Institute — East Coast Branch. Plaintiff did not disclose that he had a visa problem, and that he had been given a voluntary departure date of December 26, 1965 by the Immigration and Naturalization Service, to leave the United States. The day after his appointment, the Immigration and Naturalization Service informed the Defense Language Institute that plaintiff lacked an employable immigrant status.

10. Under regular procedures, the Defense Language Institute should have checked with the Office of the Director of Defense Research and Engineering (ODDR&E), before hiring plaintiff. This Office is the designated office in the Department of Defense for handling waiver requests for exchange visitors.

11. One week after plaintiff entered on duty with the Defense Language Institute, Dr. Julia I. H. Chen, Chairman of its Far East Division, wrote a memorandum addressed to Captain Alford of the Institute praising plaintiff's capabilities as in instructor; citing the Institute's "desperate" need of Vietnamese instructors; and urging that he be invited to remain in the United States. On February 8, 1966 the Commandant of the Defense Language Institute informed

ODDR&E that it would like to pursue the matter of obtaining a waiver for plaintiff.

12. ODDR&E ascertained, in addition to the information listed above, that AID opposed a waiver because plaintiff was critically needed in the schools of Vietnam, and that the Embassy of Vietnam opposed a waiver because of plaintiff's military service obligation.

13. On February 14, 1967, ODDR&E informed the Defense Language Institute of the results of its consideration of the question of a request for waiver, and that it has concluded that there was no basis for a waiver. The Commandant of the Institute agreed, and withdrew the request for any action for the waiver.

14. On March 9, 1966, David Carliner, plaintiff's attorney, wrote to the Secretary of Defense requesting reversal of the decision of the Defense Language Institute not to initiate a request for a waiver. Mr. Carliner wrote:

> I have been informed that the Department of Defense has been guided in its decision by the position taken by the International Training Division of the Agency for International Development and of the VietNamese Embassy. The Agency for International Development, which financed Mr. Lekhac's study at Columbia University, believes that he should return to Viet Nam to teach VietNamese. The Viet Namese Embassy opposes Mr. Lekhac's continued presence in the United States for its own political reasons.
>
> Neither of these reasons seem relevant to a decision which must be made by the Secretary of Defense to determine whether Mr. Lekhac's services are necessary in the public interest of the United States. . . .
>
> It may assist you in rendering your decision to know that in no event does Mr. Lekhac plan to return to Viet Nam at the present time. Prior to his departure for the United States, he had been banished by the Vietnamese authorities to an isolated area

> because of public criticism of the government. If he is required to leave the United States he will take up residence in a third country. . . .

15. On March 18, 1965, Lt. General William J. Ely, Deputy Director, Administration and Management, ODDR&E, replied to Mr. Carliner, in part as follows:

> I believe you are familiar with Defense policy and procedure on waiver requests and received a copy of the enclosed policy statement prior to review of a waiver application you submitted to our office in 1965. When you discussed Mr. Lekhac's situation with Mrs. Astrid Kraus on March 2, 1966, you were informed that DLI in early February had requested our assistance in securing a waiver for Mr. Lekhac and that our review resulted in a determination that a valid waiver request could not be made to the Department of State in this case. In view of the urgent need for Viet Namese instructors, this decision was reluctantly reached after a careful assessment of all relevant factors.
>
> An important factor in this decision was Mr. Lekhac's status as a participant in an official exchange visitor program of the U.S. Government. Both Defense policy and an Interagency Agreement (Foreign Affairs Manual Circular No. 292), to which Defense is a signatory, require the concurrence of the sponsoring Federal agency to a waiver request by another interested Federal agency. As an AID grantee selected by his own government for U. S. training, Mr. Lekhac has a special obligation to honor his return-home commitment. Since his AID support was terminated in April, 1963, AID and the Embassy of Viet Nam sought to secure his return to Viet Nam after the birth of his child and an adverse decision on his own exceptional hardship waiver applications.
>
> Both in our original waiver review requested by the Defense Language Institute and in the current reassessment of the merits of a waiver in response to your letter, we find that AID, the Department of State

and the Viet Namese Government stand firmly opposed to a waiver on program, policy and foreign relations grounds. If Viet Nam needs Mr. Lekhac's services in a military or civilian capacity in support of Joint US-Viet Nam objectives in Viet Nam, in our judgment this requirement must take precedence over Department of Defense needs for his language instructions services here. In another AID grantee case considered recently both AID and the Viet Namese Embassy gave written concurrence to our waiver request to help enable the Defense Language Institute to meet its urgent Viet Namese Language requirements in a prime program area.

You report that Mr. Lekhac would take up residence in a third country rather than return to View Nam at the present time. Unless there is a genuinely valid basis for such a decision on Mr. Lekhac's part, this would, in view of the U. S. commitments in Viet Nam, reinforce rather than alter the judgment that a waiver would not be in the U. S. National interest. Your reference to Mr. Lakhac's banishment by the Viet Namese authorities to an isolated area because of public criticism of the government in power prior to his U. S. admission in 1960 introduces a factor that has not, to our knowledge, been previously raised. You may wish to bring any relevant information you have on this matter to the attention of the Desk Officers in AID and the Department of State who would be competent to evaluate the facts and the effect of such a situation on AID's present position with respect to a waiver. Under our working relationship with AID and State, we are notified of any change in their position in a case of interest to the Department of Defense.

16. The Defense Language Institute has not terminated plaintiff's appointment, and he has continued to work there pending the outcome of the deportation proceedings.

17. Plaintiff on August 12, 1966, filed a motion with the Immigation and Naturalization Service, pursuant to Section 243(h)

of the Immigration and Nationality Act, 8 U.S.C. 1253(h), to withhold deportation to Vietnam on the ground that he will be subject to persecution if he is deported to that country.

/s/ David G. Bress
United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Nathan Dodell
Assistant United States Attorney

JA 15

Standard Form 52—Rev. Dec. 1961
U.S. Civil Service Commission

REQUEST FOR PERSONNEL ACTION

[G. EXH 1]

FPM 101-2-101

PART I. REQUESTING OFFICE: Unless otherwise instructed, fill in all items in this part except those inside the heavy lines. If applicable, obtain resignation and separation data on reverse side.

1. NAME (CAPS) LAST—FIRST—MIDDLE MR.—MISS—MRS.	2. (For agency use)	3. BIRTH DATE (Mo., Day, Year)	4. SOCIAL SECURITY NO.

A. KIND OF ACTION REQUESTED. (1) PERSONNEL (Specify appointment, reassignment, resignation, etc.)	B. REQUEST NUMBER	C. DATE OF REQUEST
RECRUIT 01	DLIEC 34-66	15 Dec 65
D. POSITION (Specify establish, revise, abolish, etc.)	D. PROPOSED EFFECTIVE DATE 26 Dec 65	E. POSITION SENSITIVITY

5. VETERAN PREFERENCE 1—NO 2—5 PT. 3—10 PT. DISAB. 4—10 PT. COMP. 5—10 PT. OTHER	6. TENURE GROUP	7. SERVICE COMP. DATE	8. PHYSICAL HANDICAP CODE

9. FEGLI 1—COVERED 2—INELIGIBLE 3—WAIVED	10. RETIREMENT 1—CS 2—FICA 3—FS 4—NONE 5—OTHER	11. (For CSC use)

12. NATURE OF ACTION CODE	13. EFFECTIVE DATE (Mo., Day, Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
	04-15-66	

15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. GRADE OR LEVEL	18. SALARY

19. NAME AND LOCATION OF EMPLOYING OFFICE

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	22. GRADE OR LEVEL	23. SALARY
Instructor of Foreign Language (Vietnamese)	GS-1710	GS-7	

24. NAME AND LOCATION OF EMPLOYING OFFICE

Defense Language Institute, East Coast Branch
U.S. Naval Station (Anacostia Annex), Washington, D.C., 20390-

25. DUTY STATION (City—county—State)	26. LOCATION CODE
U.S. Naval Station (Anacostia Annex), Washington, D.C., 20390	

27. APPROPRIATION	28. POSITION OCCUPIED 1—COMPETITIVE SERVICE 2—EXCEPTED SERVICE	29. APPORTIONED POSITION FROM: 1—PROVED-1 2—WAIVED-2 TO: STATE
	1	

REMARKS BY REQUESTING OFFICE (Continue in item F on reverse side, if necessary. Show, if applicable, any known additional or modified reasons for resignation)

This recruitment would replace Mrs. Quang.

E. REQUESTED BY (Signature and title)	I. REQUEST APPROVED BY:
JAMES W. ALFORD Captain, USAF, Civ Personnel Coordinator	SIGNATURE: ROBERT D. HILL, Commander, USN TITLE: Commandant
FOR ADDITIONAL INFORMATION—CALL (Name and telephone number) Captain J.W. Alford, 82837	

PART II. TO BE COMPLETED BY PERSONNEL OFFICE (Items inside heavy lines in Part I above also to be completed)

J. POSITION CLASSIFICATION ACTION: IDENTICAL ADDITIONAL ☐ NEW ☐ VICE ☐ REGRADED ☐

CLEARANCES	Initials or Signature	Date
(1)		3 3 65
(2) CEIL. OR POS. CONTROL		
(3) CLASSIFICATION		
(4) PLACEMENT OR EMPL.		
(5)		
(6) APPROVED BY:		

(7) REMARKS: (Note: Use item 19 on reverse for Standard Form 50 remarks)

QUALIFICATION STANDARD: GS-1710-3
1/3/66. No great quantities under Cubian Prog DSC

33

[G. EXH. 2]

APPLICATION FOR FEDERAL EMPLOYMENT

57-10

Kind of position applied for, or name of examination: VIETNAMESE INSTRUCTOR

Announcement No.:

Locations for which you wish to be considered *(if listed in examination announcement)*:

Primary place(s) of employment applied for *(City and State)*: WASHINGTON, D. C., EL PASO, TEXAS.

Name: *(First name)* BONG *(Middle)* *(Maiden, if any)* *(Last)* LE-KHAC

Address *(Number, Street, City, State and Zip Code)*: 613 - 23rd St, N.W., WASHINGTON, D.C

6. Home phone: 333-8356

7. Office phone: OL 2-1725

Legal voting residence *(State)*:

9. Height without shoes: 5 ft. 2 inches

10. Weight: 98

11. Sex: [x] Male [ ] Female

12. Marital status: [x] Married [ ] Single *(Incl. widowed, divorced)*

Birthplace *(City and State, or foreign country)*: SOUTH VIETNAM

14. Birth date *(Month, day, year)*: March 17, 1932

15. Social Security Number: 577 | 62 | 3128

16. If you have ever been employed by the Federal Government, indicate last grade and job title.

Vietnamese Instructor at F.S.I (State Department)
Translator and announcer at V.O.A

Dates of service in that grade: From April 1963 To Dec 1964

DO NOT WRITE IN THIS BLOCK
For Use of Examining Office Only

ANNOUNCEMENT NO.

[ ] Appor. [ ] Nonappor. | Material: [ ] Submitted [ ] Returned | Entered Register:

Notations: New Citizen

App. Reviewed: 1/11/66

App. Approved: 1/11/66

APPLICATION NO.

Option	Grade	Earned Rating	Preference	Augm. Rating
			[ ] 5 points (Tent.)	
Instructing in Vietnamese Language (Vietnamese)			[ ] 10 points (Comp. Disab.) [ ] Other 10 Point	
GS-1710.7			[ ] Disab.	
			[ ] Being Investigated	
Initials and date	[illegible]			

17. AVAILABILITY INFORMATION

Lowest grade or pay you will accept: GS-7 ($7,705 Per Year)

B. Will you accept temporary appointment? *(Acceptance or refusal of temporary employment will not affect your consideration for other appointments.)* [ ] Yes [ ] No If "Yes," indicate by "X" in appropriate box or boxes.
[ ] 1 mo. or less [ ] 1 to 4 months [x] 4 to 12 months

C. Will you accept less than full-time employment (less than 40 hours per week)? [ ] Yes [ ] No

D. Are you willing to travel? [ ] Not at all [x] Occasionally [ ] Frequently

E. Will you accept employment: In Washington, D.C.? [x] Yes [ ] No Outside U.S.? [ ] Yes [ ] No

F. Will you accept appointment only in certain locations? [ ] Yes [ ] No
If "Yes," list locations: WASHINGTON, D.C., EL PASO, TEXAS.

18. ACTIVE MILITARY SERVICE AND VETERAN PREFERENCE

List Dates, Branch, and Serial or Service Number of All Active Service

From	To	Branch of Service	Serial or Service Number

Have you ever been discharged from the armed forces under other than honorable conditions? [ ] Yes *(Give details in Item 39)* [ ] No

B. Do you claim 5-point preference based on wartime military service? [ ] Yes [ ] No

D. Do you claim 5-point preference based on service during peacetime campaign? [ ] Yes *(Complete and attach Standard Form 15)* [ ] No

Do you claim 10-point preference? [ ] Yes [ ] No *If "Yes," check type of preference claimed and complete and attach Standard Form 15, "Veteran Preference Claim."* TYPE: [ ] Compensable disability [ ] Disability [ ] Wife [ ] Widow [ ] Mother

THIS SPACE FOR USE OF APPOINTING OFFICER ONLY

The information given in answer to Question 18 has been verified with the discharge certificate and/or other proof which shows that the separation was under honorable conditions.

VETERAN PREFERENCE ALLOWED: [ ] 5-point [ ] 10-point Comp. Disab. [ ] Other 10-point [ ] None

Signature and title	Agency	Date

PLEASE BE SURE TO READ ATTACHED INSTRUCTIONS BEFORE COMPLETING ITEM 19

19. EXPERIENCE *(Start with your PRESENT position and work back)*

quiry be made of your present employer regarding your character, qualifications, and record of employment? ☑ Yes ☐ No

tes of employment *(month, year)*	Exact title of position	Number and kind of employees you supervise
om 1964 To present time	Vietnamese instructor guitar instructor	D.L.I students (9) music students (60)

or earnings	Classification Grade *(If in Federal service)*	Place of employment *(City & State)*	Kind of business or organization, *(Manufacturing, accounting, insurance, etc.)*
$ 80.00 per week $ 5 - 7.50 per hour (music)		Senz school (D.C) Y.W.C.A (D.C.) Music and Arts Center (Md.)	School of Languages school of Music

d address of employer *(firm, organization, etc.)*	Name, title, and present address of immediate supervisor
School of Languages (Washington, D.C) C.A., 17 K St. (D.C) and Arts Center (Bethesda, 7901 Wisconsin Ave	Mr. Dieguez, supervisor, Senz School of languages Mrs. Mc Connel, Music Director, Y.W.C.A. D.C. Mr. O'Brien, President, Music and Arts Center, Inc.

for wanting to leave wanti to get a permanent job. (7901 Wisconsin Ave - (Bethesda, Md.)

ion of work teaching Servicemen to speak
and write Vietnamese language
teaching guitar playing for to
adults and children

I'm making now approximately 1.300.00 a month

ates of employment *(month, year)*	Exact title of position	Number and kind of employees you supervised
om April 1963 To Dec. 1964	Vietnamese instructor translater and announcer	

e earnings	Classification Grade *(If in Federal service)*	Place of employment *(City & State)*	Kind of business or organization, *(Manufacturing, accounting, insurance, etc.)*
$ 5000.00 per year $ 17.50 per assignment	ES-6	F.S.I (State Department) V.O.A (U.S.I.A.)	

d address of employer *(firm, organization, etc.)*	Name, title, and present address of immediate supervisor
I (State Department) C.A. (U.S.I.A.)	Mrs. Jordem (F.S.I) Mr. Dreja (V.O.A.)

for leaving want to get a better pay job
ion of work teaching Servicemen and foreign Service officers to speak
and occasionally write Vietnamese language (F.S.I)
translating and announcing Vietnamese news material at V.O.A

I'm also a translater for U.S. Joint Publications Research Service

ates of employment *(month, year)*	Exact title of position	Number and kind of employees you supervised
om 1957 To 1960	language professor	

e earnings	Classification Grade *(If in Federal service)*	Place of employment *(City & State)*	Kind of business or organization, *(Manufacturing, accounting, insurance, etc.)*
Vietnamese pesos $ 7.500.00 per month $ per		VOTANH College (Nhatrang, V.N.)	Public College

d address of employer *(firm, organization, etc.)*	Name, title, and present address of immediate supervisor
TANH COLLEGE (South Viet-Nam)	The present director of VOTANH College

for leaving want to come to U.S.A.
ion of work teaching Vietnamese, French and English languages

IF YOU NEED ADDITIONAL EXPERIENCE BLOCKS USE STANDARD FORM 57-A OR BLANK SHEETS
SEE INSTRUCTION SHEET

16—78419-2

ATTACH SUPPLEMENTAL SHEETS OR FORMS HERE

• ANSWER ALL QUESTIONS CORRECTLY AND FULLY

20. SPECIAL QUALIFICATIONS AND SKILLS

A. Kind of License or Certificate (For example, pilot, teacher, registered nurse, lawyer, radio operator, C.P.A., etc.)	B. State or other licensing authority	C. Year of first license or certificate	D. Year of latest license or certificate

E. Special skills you possess and machines and equipment you can use. (For example, short wave radio, multilith, comptometer, key punch, turret lathe, transcribing machine, scientific or professional degree)

F. Approximate number of words per minute:

Typing	Shorthand

G. Special qualifications not covered in application. (For example, your most important publications (do not submit copies unless requested); your patents or patents re. public speaking and publications experience; membership in professional or scientific societies, etc.; and honors and fellowships received.)

21. EDUCATION

A. Place "X" in column indicating highest grade completed

1	2	3	4	5	6	7	8	9	10	11	12

B. If you graduated from high school, give date: Sept 1952

C. Name and location of last high school attended: Khai Dinh High School Baccal. I & II part (Hue, Central V.N)

D. Name and location of college or university	Dates attended From	Dates attended To	Years completed Day	Years completed Night	Credit hours Semester	Credit hours Quarter	Degree received	Year received
University of Montpellier (France)	1952	1954		Different courses				1954
University of Saigon (V.N)		1955		Teacher training				
Columbia University (Teachers College)	1960	1963			75		teaching	

E. Chief undergraduate college subjects	Semester Hours Credit	Quarter Hours Credit	F. Chief graduate college subjects	Semester Hours Credit	Quarter Hours Credit
education linguistics			education linguistics		
literature (6) V. literature	35		applied linguistics	40	
literature (several years study)					

G. State major field of study at highest level of college work: education

H. Other schools or training (For example, trade, vocational, Armed Forces, or business). Give for each the name and location of school, dates attended, subjects studied, certificates, and any other pertinent data.

seminar for English teachers (Dalat, Vietnam, 1957)
Research and study on methods of teaching English as a Second Language

22. FOREIGN TRAVEL

Have you lived or traveled in any foreign countries?

☒ Yes ☐ No

If "Yes," enter in item 26 name of countries, dates and for how long spent there and reason or purpose (military service, business, education, or travel).

• lived on VN from both visits 1952 and 1955 – 1960

23. FOREIGN LANGUAGES

Enter foreign language and indicate your knowledge of each by placing "X" in proper column	Reading Exc.	Reading Good	Reading Fair	Speaking Exc.	Speaking Good	Speaking Fair	Understanding Exc.	Understanding Good	Understanding Fair	Writing Exc.	Writing Good	Writing Fair
English		X			X			X			X	
French		X			X			X			X	
Spanish		X				X			X			X

24. REFERENCES

List three persons living in the United States or territories of the United States who are NOT RELATED TO YOU AND WHO HAVE DEFINITE KNOWLEDGE of your qualifications and fitness for the position for which you are applying. Do not repeat names of supervisors listed under Item 19.

FULL NAME	PRESENT BUSINESS OR HOME ADDRESS (Number, Street, City, State and Zip Code)	BUSINESS OR OCCUPATION
Miss Marcia Reed	Library of Congress	Librarian (analyst)
Miss Marianne Lehr Mrs. Shumaker Kathleen	F.S.I (State Department) Music and Arts Center, 7961 Wisconsin Ave. Bethesda Md	scientific linguist supervisor
Mrs. Myriam Zwietzinska	Embassy of the Congo	clerk.

* 402 Beall Ave, Rockville, Md.

16—76419-2

ANSWER ALL QUESTIONS BY PLACING "X" IN PROPER COLUMN	YES	NO
Are you a citizen of the United States of America? If "No," give country of which you are a citizen: VIETNAM		X
Are you now, or have you ever been, a member of the Communist Party, U.S.A., the Communist Political Association, the Young Communist League, or any Communist organization?		X
Are you now or have you ever been a member of any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means?		X
If your answer to 26 and/or 27 above is "Yes," state on a separate sheet attached to and made a part of this application the names of all such organizations, associations, movements, groups or combination of persons and dates of membership. Give complete details of your activities therein and make any explanation you desire regarding your membership or activities. (See Instruction Sheet.)		
Have you any physical handicap, chronic disease, or other disability?		X
Have you ever had a nervous breakdown?		X
Have you ever had tuberculosis?		X
If your answer to 28, 29, or 30 above is "Yes," give details in Item 39.		
Have you ever been barred by the U.S. Civil Service Commission from taking examinations or accepting civil service appointment? *(If your answer is "Yes," give dates of and reasons for such debarment in Item 39.)*		X
Does the United States Government employ in a civilian capacity any relative of yours (by blood or marriage) with whom you live or have lived within the past 24 months? *If your answer is "Yes," give in Item 39 for EACH such relative (1) full name; (2) present address; (3) relationship; (4) department or agency by which employed; and (5) kind of appointment.*		X
Do you receive or have you applied for an annuity from the United States or District of Columbia Government under any retirement act or any pension or other compensation for military or naval service? *If your answer is "Yes," give details in Item 39.*		X
Are you an official or employee of any State, territory, county, or municipality? *If your answer is "Yes," give details in Item 39.*		X
Have you ever been discharged (fired) from employment for any reason?		X
Have you ever resigned (quit) after being informed that your employer intended to discharge (fire) you for any reason?		X
If your answer to 35 or 36 above is "Yes," give details in Item 39. Show the name and address of employer, approximate date, and reasons in each case. This information should agree with statements made in Item 19—Experience.		
Have you ever been arrested, taken into custody, held for investigation or questioning, or charged by any law enforcement authority? (You may omit: (1) Traffic violations for which you paid a fine of $50.00 or less; and (2) anything that happened before your 16th birthday. All other incidents must be included, even though they were dismissed or you merely forfeited collateral.)		X
While in the military service were you ever arrested for an offense which resulted in a trial by deck court or by summary, special, or general court-martial?		X
If your answer to 37 or 38 is "Yes," give details in Item 39, showing for each incident: (1) date, (2) charge, (3) place, (4) law enforcing authority or type of court or court-martial, and (5) action taken.		

SPACE FOR DETAILED ANSWERS TO OTHER QUESTIONS. Indicate item numbers to which answers apply.

No.		Item No.	

re space is required, use full sheets of paper approximately the same size as this page. Write on each sheet your name, date of birth, and exami- n title. Attach on inside of this application.

ATTENTION: READ THE FOLLOWING PARAGRAPH CAREFULLY BEFORE SIGNING THIS APPLICATION

alse or dishonest answer to any question in this application may be grounds for rating you ineligible for Federal mployment, or for dismissing you after appointment, and may be punishable by fine or imprisonment (U.S. Code, itle 13, Sec. 1001). All statements made in the application are subject to investigation, including a check of your ngerprints, police records, and former employers. All information will be considered in determining your present tness for Federal employment.

CERTIFICATION

ERTIFY that all of the statements made in this application are true, complete, and correct to the best of my knowledge and belief and are made good faith.

nature of applicant Richard B. Long (Sign in ink) Date 7/4/1966

[G. EXH. 3]

DEFENSE LANGUAGE INSTITUTE
EAST COAST BRANCH
U. S. NAVAL STATION (ANACOSTIA ANNEX)
WASHINGTON, D.C., 20390

NAME Bong, Le-Khac LANGUAGE Vietnamese

DATE INTERVIEWED Jan. 7, 1966

	EXCELLENT	GOOD	FAIR	POOR	
Personality		X			
Education in Native Country	X				
Pronunciation of Native Language	X				
Grammar in Native Language	X				
Command of English		X			
Apparent Area Knowledge		X			
Test Results (when applicable)	X				

General Impression: Favorable X Unfavorable

Recommendation(s):

1. Should be favorably considered X
2. Interview with administration X
3. Should not be favorably considered
4. File application for future consideration
5. Further interview with language department chief X

Remarks: (Use additional sheet if necessary)

I gave him written tests in both English and Vietnamese, and they were excellent.

APPLICANT EVALUATION

SIGNATURE

JA 21

[G. EXH. 4]

DEPARTMENT OF THE ARMY
STAFF CIVILIAN PERSONNEL DIVISION
OFFICE, CHIEF OF STAFF
ROOM 1E 429, THE PENTAGON
WASHINGTON, D. C. 20310

CSSCPD-ER

10 January 1966

TO:

Miss Marianne Lehr
F. S. I. (State Department)
Washington, D. C.

Dear Miss Lehr:

Mr. Bong-Le-khac is being considered by this Department for a position as Instructor of Foreign Language (Vietnamese), GS-7.

In the application for employment, the candidate indicates:
☒ your name as a reference ☐ association with your organization from

..... to .....

The Department is charged with the responsibility of administering certain critical programs both at home and abroad. It is essential that these programs be administered in a manner which reflects to the credit of this Government. Therefore, it is necessary that individuals selected for employment be fully qualified and have personal characteristics and loyalty which are above reproach.

In selecting applicants we must depend in a large measure upon information and advice given us by persons who have been associated with them. It will be appreciated, therefore, if you will furnish to the best of your knowledge information as indicated on the reverse side of this letter. Your frank evaluation will be of great assistance to us in determining the applicant's suitability for selection for the above position. The information which you furnish will be held in confidence.

Inasmuch as final selection for this position will be influenced by your reply, we shall appreciate hearing from you as soon as possible. We are enclosing a self-addressed envelope which requires no postage.

Sincerely yours,

for WM J. HOMAN
Chief, Recruitment and Examining Section
Staff Civilian Personnel Division

Inclosure
Self addressed envelope

JA 22

DEPARTMENT OF DEFENSE
EMPLOYMENT INQUIRY

Form Approved
Budget Bureau No. 22-R134.2

1. HOW LONG HAVE YOU KNOWN APPLICANT AND IN WHAT CAPACITY(IES)? (Check applicable block and enter below.)

CAPACITY	APPROXIMATE TIME KNOWN
SUPERVISOR	6 months
EMPLOYER	
FELLOW EMPLOYEE	
ACQUAINTANCE	2 years
OTHER (Specify)	

2. IF EMPLOYER OR SUPERVISOR, INDICATE:

BEGINNING SALARY $5,035.	POSITION TITLE Training Instructor	DATE 11/3/63
LAST SALARY $5,235.	POSITION TITLE Training Instructor	DATE 6/19/64

3. IF NO LONGER IN YOUR EMPLOY, SHOW REASON FOR LEAVING
Mr. Berg was offered a better position.

4. WOULD YOU REEMPLOY APPLICANT IN THE SAME POSITION?
☒ YES ☐ NO (If no, indicate reasons under "Remarks")

PERSONAL APPRAISAL (Based on your experience with applicant, indicate by check mark in the appropriate column your evaluation of the following factors)	INSUFFICIENT OPPORTUNITY TO OBSERVE	OUTSTANDING	BETTER THAN AVERAGE	ADEQUATE	UNSATISFACTORY
5a. DEPENDABILITY - ACCEPTS ASSIGNED RESPONSIBILITY AND EFFECTIVELY ACCOMPLISHES DUTIES IN AN APPROVED MANNER WITHIN TIME ESTABLISHED.		✓			
b. COOPERATION - A TEAM WORKER. MAINTAINS GOOD WORKING RELATIONSHIPS.			✓		
c. INITIATIVE AND CREATIVENESS - ABILITY TO THINK ALONG ORIGINAL LINES AND TO WORK WITHOUT DETAILED INSTRUCTIONS OR SUPERVISION.		✓			
d. EMOTIONAL STABILITY - POISE AND JUDGMENT IN MEETING ADVERSE OR EMERGENCY SITUATIONS.				✓	
e. ADJUSTABILITY - ABILITY TO ADJUST TO CHANGES IN WORKING OR LIVING ENVIRONMENTS.			✓		
f. CONSIDERATION FOR OTHERS - COURTEOUS IN DAILY CONTACTS INCLUDING ATTITUDE TOWARD DIFFERENT RACES, RELIGIONS, AND NATIONALITIES.		✓			
g. COMPLETE ONLY IF CHECKED ☒ JOB KNOWLEDGE - HAS KNOWLEDGE OF TECHNIQUES AND PROCEDURES APPLICABLE TO THE JOB FOR WHICH BEING CONSIDERED.			✓		
☒ MANAGERIAL SKILLS - ABILITY TO PLAN AND ORGANIZE WORK.			✓		
☐ SUPERVISION - ABILITY TO SUPERVISE OTHER EMPLOYEES.					

CHECK APPLICABLE BLOCK	YES	NO
6a. DO YOU HAVE ANY REASON TO QUESTION THIS PERSON'S LOYALTY TO THE UNITED STATES?		X
b. DO YOU HAVE ANY REASON TO BELIEVE THIS PERSON BELONGS, OR HAS BELONGED, TO ANY COMMUNIST OR FASCIST ORGANIZATION, OR TO ANY ORGANIZATION WHICH ADVOCATES OVERTHROWING OR ALTERING OUR CONSTITUTIONAL FORM OF GOVERNMENT BY FORCE OR OTHER ILLEGAL MEANS?		X
c. TO YOUR KNOWLEDGE DOES THIS PERSON ASSOCIATE, OR HAS HE ASSOCIATED, WITH ANY PERSON WHOSE LOYALTY TO THE UNITED STATES IS QUESTIONABLE OR WHO BELONGS TO ANY OF THE TYPES OF ORGANIZATION DESCRIBED IN 6b. ABOVE?		X
7a. DO YOU HAVE ANY KNOWLEDGE OF ANY BEHAVIOR, ACTIVITIES, OR ASSOCIATIONS WHICH TEND TO SHOW THAT THIS PERSON IS NOT RELIABLE, HONEST, TRUSTWORTHY, AND OF GOOD CONDUCT AND CHARACTER?		X
b. DO YOU HAVE ANY KNOWLEDGE THAT CANDIDATE'S PERFORMANCE ON THE JOB OR OFF-DUTY CONDUCT IS ADVERSELY AFFECTED BY THE USE OF ALCOHOLIC BEVERAGES?		X
c. DO YOU HAVE ANY KNOWLEDGE OF ANY PHYSICAL OR MENTAL CONDITION WHICH WOULD ADVERSELY AFFECT APPLICANT'S WORK PERFORMANCE?		X

NOTE: If your answer to any question in 6 or 7 is yes, please give full details under "Remarks"

8. REMARKS (If more space is required, attach additional sheet)

Mr. Berg is a very talented, creative person. He can be an immensely great asset to any teaching program if he is given even a small opportunity to use his talents.

DATE	NAME OF ORGANIZATION	YOUR POSITION OR TITLE AND SIGNATURE
1/13/66	Department of State - Foreign Service Institute	Management Intern [illegible]

DD FORM 1 APR 59 556 PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE. * GPO : 1959 O—503419

[G. EXH 5]

EFERRAL FOR CONSIDERATION

INSTRUCTIONS: Please give consideration as indicated below. Complete the form to show result of consideration and return with attachments in a sealed envelope to THE CIVILIAN PERSONNEL OFFICE.

Name, Organization, Room, as needed)
Capt. Alfred Laffin, Jr.

NAME OF APPLICANT
Bong Ne-Khac

☐ VETERAN
☐ NONVETERAN

☐ INTERVIEW
☐ CIVIL SERVICE ATTACHED APPLICATION

CAUSE OF REFERRAL (Identity of request, etc., as needed)
Meets written requirements for

TION FOR WHICH REFERRED
Gen. Sls. & Instructor of Foreign Language

RKS (Use reverse if additional space is required)
(Vietnamese), GS-1710-07; subject to eligibility
Examination. There are no citizen eligible.

	PHONE NO.	BUILDING AND ROOM NUMBER	SIGNATURE
I.C.	73133	IE429	Nhin J. Bozek

ICANT IS

☒ SELECTED ☐ NOT SELECTED (Give reasons in remarks below)

DESIRED DATE OF ENTRANCE ON DUTY
17 Jan 66

RKS
(e only other non Citizen Eligible is Dang Ngoc Thanh
(ferred by DD 359 on 12/30/65)

SIGNATURE	TITLE	DATE
[signature]	Director of Courses	14 Jan 66

FORM 359
1 JUN 57

REPLACES DD FORM 359, 1 JUL 50, WHICH IS OBSOLETE.

[G. EXH. 6]

DEPARTMENT OF THE ARMY
DEFENSE LANGUAGE INSTITUTE, EAST COAST BRANCH
U.S. NAVAL STATION (ANACOSTIA ANNEX)
WASHINGTON, D.C. 20390

11 JAN 1966

DLIEC-COMPT-C

SUBJECT: Selection of Applicant - Vietnamese

TO: Staff Civilian Personnel Division
ATTN: Recruitment & Examining Section
(Mrs. Boyer)
Rm 1E429, The Pentagon
Washington, D. C.

1. Reference SF52# DLIEC 34-66, 15 DEC 65 and DF, DLIEC-CPC, subject: "Evaluation of SF57 - Mr. Bong," dated 23 SEP 64.

2. Mr. Bong Le - Khac is selected to fill the current Vietnamese instructor vacancy at grade GS-7. Request he be appointed as soon as possible.

FOR THE COMMANDANT:

ROBERT E. FLEXNER
LTJG USNR
Administrative Officer

STANDARD FORM 61
REVISED JUNE 1957
U.S. CIVIL SERVICE COMMISSION
F.P.M. CHAPTER A6

[G. EXH. 7]

APPOINTMENT AFFIDAVITS

IMPORTANT.—*Before swearing to these appointment affidavits, you should read and understand the attached information for appointee*

DEPT. OF THE ARMY, OFFICE, DEPUTY CHIEF OF STAFF FOR PERSONNEL, WASHINGTON, D.C.
(Department or agency) (Bureau or division) (Place of employment)

BONG LE-KHAC, do solemnly swear (or affirm) that—

OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion; that I will well and faithfully discharge the duties of the office on which I am about to enter, SO HELP ME GOD.

AFFIDAVIT AS TO SUBVERSIVE ACTIVITY AND AFFILIATION

I am not a Communist or Fascist. I do not advocate nor am I knowingly a member of any organization that advocates the overthrow of the constitutional form of the Government of the United States, or which seeks by force or violence to deny other persons their rights under the Constitution of the United States. I do further swear (or affirm) that I will not so advocate, nor will I knowingly become a member of such organization during the period that I am an employee of the Federal Government or any agency thereof.

AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof. I do not and will not assert the right to strike against the Government of the United States or any agency thereof while an employee of the Government of the United States or any agency thereof. I do further swear (or affirm) that I am not knowingly a member of an organization of Government employees that asserts the right to strike against the Government of the United States or any agency thereof and I will not, while an employee of the Government of the United States or any agency thereof, knowingly become a member of such an organization.

AFFIDAVIT AS TO PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing such appointment.

AFFIDAVIT AS TO DECLARATION OF APPOINTEE

The answers given in the Declaration of Appointee on the reverse of this form are true and correct.

01-18-66
(Date of entrance on duty)

Bong Le-Khac
(Signature of appointee)

Subscribed and sworn before me this 18th day of January A. D. 1966,

Washington, D.C.
(City)

(State)

[SEAL]

Ellen M. Bodine
(Signature of officer)

ACTING CHIEF, PROCESSING & RECORDS SECTION
(Title)

NOTE.—*The oath of office must be administered by a person specified in 5 U. S. C. 18, or by a person designated to administer oaths under Section 206, Act of June 26, 1943, 5 U. S. C. 16a. If by a Notary Public, the date of expiration of his commission should be shown.*

DECLARATION OF APPOINTEE

This form is to be con . ated before entrance on duty. Answer .l questions. Admitted unfavorable information about such matters as arrests or discharges will be considered together with the favorable information in your record in determining your present fitness for Federal employment. However, a false statement or dishonest answer to any question may be grounds for dismissal after appointment and is punishable by law.

1. PRESENT ADDRESS (*street and number, city and State*)
618 - 23rd St, N.W., Washington, D.C.

2. (A) DATE OF BIRTH	(B) PLACE OF BIRTH (*city and State or city and foreign country*)
March 17, 1932	South Viet-nam (Thuathien) - Khestrang -

3. (A) IN CASE OF EMERGENCY, PLEASE NOTIFY	(B) RELATIONSHIP	(C) STREET AND NUMBER, CITY AND STATE	(D) TELEPHONE NO.
Linda Ina Freedland	wife	515 Ave I, Brooklyn, N.Y.	DE 5-8433

4. DOES THE UNITED STATES GOVERNMENT EMPLOY, IN A CIVILIAN CAPACITY, ANY RELATIVE OF YOURS (EITHER BY BLOOD OR MARRIAGE) WITH WHOM YOU LIVE OR HAVE LIVED WITHIN THE PAST 24 MONTHS? ☐ YES ☒ NO
If so, for each such relative fill in the blank below. If additional space is necessary, complete under Item 12.

NAME	POST OFFICE ADDRESS (*Give street number, if any*)	(1) POSITION (2) TEMPORARY OR NOT (3) DEPARTMENT OR AGENCY IN WHICH EMPLOYED	RELATIONSHIP	MARRIED (*Check one*)	SINGLE (*Check one*)
		1. 2. 3.			
		1. 2. 3.			
		1. 2. 3.			

INDICATE ANSWER BY PLACING "X" IN PROPER COLUMN	YES	NO
5. (A) ARE YOU A CITIZEN OF THE UNITED STATES OF AMERICA, OR (B) AS A NATIVE OF AMERICAN SAMOA DO YOU OWE ALLEGIANCE TO THE UNITED STATES OF AMERICA?		X
6. ARE YOU AN OFFICIAL OR EMPLOYEE OF ANY STATE, TERRITORY, COUNTY, OR MUNICIPALITY? *If your answer is "Yes," give details in Item 12.*		X
7. DO YOU RECEIVE OR HAVE YOU APPLIED FOR AN ANNUITY FROM THE UNITED STATES OR DISTRICT OF COLUMBIA GOVERNMENT UNDER ANY RETIREMENT ACT OR ANY PENSION OR OTHER COMPENSATION FOR MILITARY OR NAVAL SERVICE? *If your answer is "Yes," give details in Item 12.*		X
8. SINCE YOU FILED APPLICATION RESULTING IN THIS APPOINTMENT, HAVE YOU BEEN ARRESTED, CHARGED, OR HELD BY FEDERAL, STATE, OR OTHER LAW ENFORCEMENT AUTHORITIES, FOR ANY VIOLATION OF ANY FEDERAL LAW, STATE LAW, COUNTY OR MUNICIPAL LAW, REGULATION OR ORDINANCE? DO NOT INCLUDE TRAFFIC VIOLATIONS FOR WHICH A FINE OF $25 OR LESS WAS IMPOSED. ALL OTHER CHARGES MUST BE INCLUDED EVEN IF THEY WERE DISMISSED. *If your answer is "Yes," give in Item 12 for each case: (1) approximate date, (2) charge, (3) place, (4) action taken.*		X
9. SINCE YOU FILED APPLICATION RESULTING IN THIS APPOINTMENT, HAVE YOU BEEN BARRED BY THE U.S. CIVIL SERVICE COMMISSION FROM TAKING EXAMINATIONS OR ACCEPTING CIVIL SERVICE APPOINTMENTS? *If your answer is "Yes," give dates of and reasons for such debarment in Item 12.*		X

INDICATE ANSWER BY PLACING "X" IN PROPER COLUMN	YES	NO
10. (A) HAVE YOU EVER FILED A WAIVER OF LIFE INSURANCE COVERAGE UNDER THE FEDERAL EMPLOYEES' GROUP LIFE INSURANCE ACT?		X
(B) IF YOU HAVE FILED SUCH A WAIVER, HAS IT BEEN CANCELED OR REVOKED?		
11. SINCE YOU FILED APPLICATION RESULTING IN THIS APPOINTMENT: A. HAVE YOU BEEN DISCHARGED FROM EMPLOYMENT BECAUSE: (1) YOUR CONDUCT WAS NOT SATISFACTORY?		X
(2) YOUR WORK WAS NOT SATISFACTORY?		X
B. HAVE YOU RESIGNED AFTER OFFICIAL NOTIFICATION THAT: (1) YOUR CONDUCT WAS NOT SATISFACTORY?		X
(2) YOUR WORK WAS NOT SATISFACTORY?		X
C. HAVE YOU BEEN DISCHARGED FROM THE ARMED SERVICES UNDER OTHER THAN HONORABLE CONDITIONS? *If your answer to A, B, or C is "Yes," give details in Item 12 as clearly as you can remember, including the name and address of employer, approximate date, and reasons in each case.*		X

12. SPACE FOR DETAILED ANSWERS TO OTHER QUESTIONS (*Indicate item numbers to which answers apply.*)

ITEM NO.		ITEM NO.	

INSTRUCTIONS TO APPOINTING OFFICER.—You must determine that this appointment would be in conformance with the Civil Service Act, applicable Civil Service Rules and Regulations, and acts of Congress pertaining to appointment.

This form should be checked for holding of office, pension, any record of recent discharge or arrest, age, citizenship, and members of family. Also, to establish the identity of the appointee, you should particularly check (1) his signature and handwriting against the application and/or other pertinent papers and (2) his physical appearance against the medical certificate.

☆ U. S. GOVERNMENT PRINTING OFFICE : 1959—O-517762

[G. EXH. 8]

BOARD FORM 50 Rev. Dec. 1961
CIVIL SERVICE COMMISSION
FPM 31-1

NOTIFICATION OF PERSONNEL ACTION

50-114-09

(1) (NAME) (2nd)

407143 X | 577-32-3122

1. NAME (CAPS) LAST - FIRST - MIDDLE — MR. - MISS - MRS.	2. (FOR AGENCY USE)	3. BIRTH DATE (Mo., Day, Year)	4. SOCIAL SECURITY NO.
[redacted]	U	07-17-38	577-32-3122

5. VETERAN PREFERENCE	6. TENURE GROUP	7. SERVICE COMP. DATE	8. PHYS HAND CODE
1. - NO 3. - 10 PT. DISAD. 5. - 10 PT. OTHER 2. - 5 PT. 4. - 10 PT. COMP.	3	00-00-00	00

FEGLI	10. RETIREMENT	11. (FOR CSC USE)
1. - COVERED 2. - INELIGIBL 5. - WAIVED	2 (1. - CS 2. - FICA 3. - FS 4. - NONE 5. - OTHER)	

12. NATURE OF ACTION	13. EFFECTIVE DATE (Mo., Day, Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
702.0 [redacted] APPT, (INDEFINITE)	01-18-66	SCHEDULE A C.S. REG 213.3107(a)(3)

FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. GRADE OR LEVEL	18. SALARY

NAME AND LOCATION OF EMPLOYING OFFICE

TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	22. GRADE OR LEVEL	23. SALARY
[redacted] FOR FOR LANG (VIET) [redacted]	GS 1710	07/1	pa$ 6269.00

NAME AND LOCATION OF EMPLOYING OFFICE

[redacted] CHIEF OF STAFF FOR PERSONNEL, DEFENSE LANGUAGE INSTITUTE,
[redacted] COURT DR, FAR EAST LANG DIV, VIETNAMESE DR,
[redacted], D.C.

DUTY STATION (City - State)	26. LOCATION CODE
[redacted], D.C.	00-0010-001

APPROPRIATION	28. POSITION OCCUPIED 1—COMPETITIVE SERVICE 2—EXCEPTED SERVICE	29. APPORTIONED POSITION (FROM:)	(TO:) 1—PROVED 2—WAIVED	STATE
[redacted]	2			

REMARKS: A. SUBJECT TO COMPLETION OF 1 YEAR PROBATIONARY (OR TRIAL) PERIOD COMMENCING
B. SERVICE COUNTING TOWARD CAREER (OR PERM) TENURE FROM:
SEPARATIONS: SHOW REASONS BELOW, AS REQUIRED. CHECK IF APPLICABLE: C. DURING PROBATION D. FROM APPOINTMENT OF 6 MONTHS OR LESS

L: 03
E: 0000000
Y CAT 0

DATE OF APPOINTMENT AFFIDAVIT (Accessions only)	34. SIGNATURE (Or other authentication) AND TITLE
1-18-66	FOR THE APPOINTING OFFICER [redacted]
OFFICE MAINTAINING PERSONNEL FOLDER (If different from employing office)	
[redacted] CHIEF OF STAFF	
CODE EMPLOYING DEPARTMENT OR AGENCY	CHIEF, STAFF CIVILIAN PER DIV, OCS
R02 DEPARTMENT OF THE ARMY	35. DATE 01-18-66 2715

4. PERSONNEL FOLDER COPY

[G. EXH. 9]

25 January, 1966

Memorandum for: Capt. Alford

From: Dr. Chen

Subject: The Need of Mr. Bong's Services

1. DLIEC is desperately in need of Vietnamese instructors, especially those who can speak South Vietnamese. We have made numerous inquiries and contacted various agencies in search of qualified Vietnamese teachers. None was available because they were in great demand. It was with extreme difficulty that we finally found Mr. Le-Khac Bong who is not only a native of South VN, but also a highly qualified teacher.

2. Mr. Bong possesses good academic background. His education includes Baccalaureate, 1952 (South VN); post-graduate studies -- law and literature, 1952-54 (University of Montpellier, France); Faculty of Letters -- literature, 1955-56 (Saigon University); education and linguistics, 1960-63 (Teachers College, Columbia University). We only offer him GS7-1. With such a modest salary DLIEC can hardly hire a better educated person. Therefore, we can not afford to lose him.

3. In regard to professional qualifications, Mr. Bong's are more than adequate to meet our instructor's requirements. His past teaching and working experiences in other schools and intitutions are very valuable to DLIEC. He taught Vietnamese, English and French at Vo Tanh College, 1957-60 in South VN. At FSI he taught Vietnamese language from Apr. 1963 to June 1964. He also was a Vietnamese teacher at Sanz School of Languages. In 1964 Mr. Bong worked for the Voice of America as an announcer and translator. He

also passed the examination at Joint Publications Research Service which qualified him as a translator from Vietnamese and French into English. The last mentioned exam alone proves that his command of both Vietnamese and English (besides French) is excellent. Armed with such professional capabilities, Mr. Bong is indeed a hard-to-get addition to the Vietnamese faculty of DLIEC.

4. As far as classroom performance is concerned, Mr. Bong conducts his classes in a superb manner. He is versatile, conscientious and well versed in the employment of good and modern teaching methodology. His students like his personality and deeply appreciate his teaching techniques.

5. Another very important factor is that when DLIEC moves to EL Paso, we will definitely lose several Vietnamese instructors who have decided to remain in the Washington area. In fact a VN lady teacher already resigned last month on the ground that she did not want to go to Texas. Since Mr. Bong desires to move with our school to EL Paso, we strongly urge that this intelligent, young and able VN instructor be invited to remain in the U.S. so that DLIEC can be benefited by his invaluable services.

6. Furthermore, Mr. Bong is highly recommended by his colleagues who know him well. It is assured that his devotion to his profession and his cooperation with this school will bring greater success to the VN-language training of our military personnel at DLIEC.

Julia I. H. Chen,
Chairman, Far East Division

[G. EXH 10]

DEPARTMENT OF THE ARMY
DEFENSE LANGUAGE INSTITUTE, EAST COAST BRANCH
U.S. NAVAL STATION (ANACOSTIA ANNEX)
WASHINGTON, D.C. 20390

DLIEC-CPC

SUBJECT: Immigration Status of An Employee 25 JAN 1966

TO: Staff Civilian Personnel Division
ATTN: Personnel Management Assistance Section #2
(Mrs. Fran Miller)
Rm 1E417, The Pentagon
Washington, D. C.

1. Mr. Bong Le Khac was entered on duty with DLIEC on 18 January 1966 as an Instructor of Vietnamese, GS7.

2. This activity was advised on 19 January 1966 by Mr. D. S. Goff of the Immigration and Naturalization Service (Telephone: code 187 ext 2850 or 3791) that Mr. Bong Le Khac has "no status" as an immigrant to the United States.

3. Request your office assure that future non-citizen applicants who are selected by DLIEC for employment have an employable immigrant status in the United States before they are brought on duty. The local Immigration and Naturalization Service Office has indicated a willingness to assist your office in this matter.

4. As regards the case of Mr. Bong Le Khac, request your office take the necessary steps to retain his services with DLIEC.

FOR THE COMMANDANT:

JOHN H. GREINWALD
Captain, U. S. Army
Secretary

[illegible]

DISPOSITION FORM

[G. EXH 11]

(AR 340)

OFFICE SYMBOL OR FILE REFERENCE	SUBJECT
CSSCPD-ER	Immigration Status of Bong LeKhac

TO: DLI, East Coast Branch
ATTN: Captain John H. Greinwald, Secretary

FROM: Chief, Recruitment & Examining Section, SCPD OCofSA

DATE: 25 Feb 66

CMT 1: Mrs. Boyer/73133/cf

1. Reference is made to your letter of 25 January 1966.

2. The information outlined in subparagraph a and b below is a confirmation of a conversation between Mrs. Boyer, this office and Captain Alford of your office, on 17 February 1966.

a. The matter of Mr. LeKhac's retention in the United States was taken up with officials of the Office of Defense Research and Engineering, designated by the Secretary of the Army to handle a case such as that of Mr. LeKhac. Upon completion of the required negotiations on our behalf, Mrs. Kraus from the Office of Defense Research and Engineering informed Mrs. Boyer that Mr. LeKhac could not remain in the United States.

b. A special concession was obtained for your office to retain Mr. LeKhac for a thirty day period which will expire 15 March 1966. This special period of time was for the express purpose of easing, if possible, the problem of replacing Mr. LeKhac.

3. Confirmation of the immigrant status of future applicants will be obtained from officials of the Immigration and Naturalization Service by this office prior to the applicant's entrance on duty. However, we wish to point out that this may create some recruiting delay because the immigrant's records are not always easily located.

4. Our files show the following applicants have been rated under our announcement which opened 1 October 1965 for the position Instructor of Foreign Language (Vietnamese), GS-1710-7. The first two meet minimum qualification requirements insofar as residency and experience or education are concerned. The applicants have not been tested yet, as far as we are aware.

a. Van-Anh D. Long

b. Dang N. Tran

c. Toan Nguyen (college graduate plus 3 years' teaching experience).

5. Mr. Huan T. Hoang has not responded to our request for an SF 57, nor has Mr. Hiem N. Vu supplied information needed to rate his application.

for (B. H. J.)

WM J. HOMAN
Chief, Recruitment and Examining Section
Staff Civilian Personnel Division

Incl
SF-57 (Nguyen)

DA FORM 1 FEB 62 2496 REPLACES DD FORM 96, EXISTING SUPPLIES OF WHICH WILL BE ISSUED AND USED UNTIL 1 FEB 63 UNLESS SOONER EXHAUSTED

[G. EXH. 12]

OFFICE OF THE DIRECTOR OF DEFENSE RESEARCH AND ENGINEERING
WASHINGTON, D. C. 20301

DEPARTMENT OF DEFENSE POLICY AND PROCEDURE ON REQUESTS FOR WAIVER OF THE TWO-YEAR FOREIGN RESIDENCE REQUIREMENT OF THE EXCHANGE VISITOR PROGRAM

THE U.S. EXCHANGE VISITOR PROGRAM

During the post-war period the International Educational Exchange Program has increasingly become one of the most creative and valuable means of international cooperation and mutual assistance between the United States and over 100 countries participating in the program. U.S. policy and support for the program are set forth in the Mutual Educational and Cultural Exchange Act of 1961 (75 Stat. 535). Under the auspices of the Exchange Program, large numbers of foreign nationals come to the United States as students, visiting professors, lecturers and research scholars for educational assignments in U.S. colleges, universities, hospitals and industrial laboratories. As part of the same program, an increasing number of U.S. faculty members and students go on educational assignments to foreign countries.

The U. S. scientific and engineering community and the Department of Defense, particularly through its extensive program of basic research contracts with universities, have benefited substantially from the doctoral and postdoctoral research of foreign exchange scientists and engineers associated with these contracts. Defense industry contractors have also gained substantially from the participation of these highly qualified exchange scientists and engineers in industrial research and development programs during the 12-18 months practical training period generally permitted exchange visitors upon the completion of their academic studies.

Basic to the integrity and success of the Exchange Program is the fulfillment of the commitment that exchange visitors return home at the completion of their program and utilize to the benefit of their own countries and, implicitly, of the United States the knowledge and skills acquired here. Scientific and engineering talent is an important national asset which participating countries lose, and can ill afford to lose, when their gifted students and research scholars wish to remain in the United States and are encouraged by Americans to do so.

FOREIGN RESIDENCE REQUIREMENT AND PROVISION FOR WAIVER

The Congress and the Department of State have consistently sought to strengthen the Exchange Program and protect its integrity. To this end, the Congress in 1956 passed Public Law 555. The Mutual Educational and Cultural Exchange Act of 1961 strengthened this law further and made it a part (Section 212(e)) of the Immigration and Nationality Act. This provides:

No person admitted under Section 101(a)(15)(J) or acquiring such status after admission shall be eligible to apply for an immigrant visa, or for permanent residence, or for a non-immigrant visa under Section 101(a)(15)(H) until it is established that such person has resided and been physically present in the country of his nationality or his last residence, or in another foreign country for an aggregate of at least two years following departure from the United States: Provided, That such residence in another country shall be considered to have satisfied the requirements of this subsection if the Secretary of State determines that it has served the purpose and the intent of the Mutual Educational and Cultural Exchange Act of 1961: Provided further, That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: And provided further, That the provisions of this paragraph shall apply also to those persons who acquired exchange visitor status under the United States Information and Educational Exchange Act of 1948, as amended.

In accordance with this provision, the Department of Defense may, as an interested U.S. Government agency, submit requests for waivers to the Department of State. The Department of State reviews the request from the standpoint of policy, program and foreign relations implications. A favorable review results in a State Department recommendation that the waiver be granted to the appropriate District Office of the Immigration and Naturalization Service, which acts for the Attorney General in waiver cases. If it concurs in the recommendation, the District Office notifies the individual directly that the waiver is granted and also informs him of further steps to be taken by him and his employer to clarify his status.

DEPARTMENT OF DEFENSE RESPONSIBILITY FOR REVIEW OF WAIVER REQUESTS

Since 1957, the Office of the Director of Defense Research and Engineering has acted as a clearing house for waiver requests based mainly on exchange visitors' present or potential contribution to research and engineering work in Defense laboratories, universities and defense industry. The objective is to have one DOD focal point for information and referral purposes and to assure uniformity of review and judgment in the application of standards designed to protect the integrity of the Exchange Program and yet make it possible in

compelling cases to retain persons of unique and outstanding qualifications whose services are urgently required for programs of very great official interest to the Department of Defense. It is clearly against national policy to use the Exchange Program as a recruitment source for critical shortage specialists of exceptional calibre who have been tried and proven on the American scene. In accordance with this policy, each waiver request will be individually and strictly evaluated in terms of the following considerations and standards:

1. High priority character of the program or activity involved. The services of the exchange visitor should be needed on a high priority program of official interest to the Department of Defense. The documentary evidence submitted by the employer and supported by the sponsoring Defense activity should indicate the nature, scope, specialized personnel requirements and national security interests served by the program.

2. Essential relationship of the exchange visitor to the program. The exchange visitor should be needed as a principal participant in the program or activity involved. The documentary evidence should ~~clearly~~ indicate specifically how the loss or unavailability of the exchange visitor's services would be seriously detrimental to the initiation, continuance, completion or success of the program or activity.

3. Critical qualifications of the exchange visitor. The exchange visitor should possess unique and outstanding qualifications, training and experience, including a clearly demonstrated capability to make original and significant contributions to the program. In the case of scientists and engineers, this generally involves specialized training at the doctoral or postdoctoral level for a position on the Department of Labor List of Critical Occupations; recognition of excellence and originality in the international scientific and engineering community and through professional publications; and abilities and skills that are urgently needed and not otherwise available.

4. Need for special clearance for person on an official Exchange Program of the U.S. Government. In the case of an exchange visitor who came to the United States on an official Exchange Program of the U.S. Government, the documentary evidence should include information on satisfactory clearance with the sponsoring agency. For example, a recipient of a Fulbright Travel Grant through the Conference Board of Associated Research Councils needs to request their permission to forfeit the return portion of his grant and possibly to repay his travel to the United States. This will be determined by the Fulbright Commission in his own country which is generally reluctant to release a grantee from the pledge to give his country the benefit of his U.S. training for two years. If the Commission approves his request, the Conference Board will generally release him from his obligations to them as his Exchange Program sponsor.

5. Relevance of other factors. Consideration of waiver requests is not restricted to the professional aspects of the exchange visitor's present or potential contribution to programs of official Defense interest. Other relevant facts concerning the exchange visitor's nonimmigrant status, his commitment to return home, the attitude of his government, and the prospects for making effective use of the knowledge and capabilities acquired in the United States will be taken into account. The objective is to reach as sound and equitable a Defense decision as possible in terms of all relevant factors.

6. Application of policy to Exchange Visitor wives of U.S. citizens and lawfully resident aliens. The merits of a waiver request for an exchange visitor wife of a U.S. citizen or lawfully resident alien will be considered in accordance with the standards set forth above only when the documentary evidence clearly indicates that the loss of the husband's services through his wife's compliance with the foreign residence requirement would be clearly detrimental to programs of official Defense interest. Waiver requests based on the exceptional hardship provision of Section 212(e) of the Immigration and Nationality Act should be made directly to the nearest District Office of the Immigration and Naturalization Service which has sole jurisdiction in such cases.

PROCEDURE FOR FILING WAIVER REQUESTS

The attached Fact Sheet should be completed and sent, with appropriate documentary evidence, either directly or through a sponsoring Department of Defense activity, to

The Director of Defense Research and Engineering
Pentagon Building
Washington 25, D. C. 20301
Attention: Assistant for R&D Manpower
Room 3D 1014

Waiver requests for an exchange visitor's dependents, when required, will be included in a Defense request for a waiver in behalf of the exchange visitor. When a wife is also an exchange visitor in her own right (J-1 status) and not as her husband's dependent (J-2 status), a separate Fact Sheet should be completed for her.

Reissued
11/22/63

DEPARTMENT OF DEFENSE
OFFICE OF DIRECTOR OF DEFENSE RESEARCH & ENGINEERING

Application for Consideration of Waiver of the Two-Year Foreign Residence Requirement of the Exchange Visitor Program. (Please complete or use as model; type or print. If additional space is needed, use separate sheets and refer to item number.)

I. Applying Institution

1. Name & Location of Applying Institution:

2. Name & Phone No. of responsible official:

II. Individual for Whom Waiver is Requested

3. Name:

4. Maiden Name (if married):

5. Date and Place of Birth:

6. Nationality:

7. Exchange Visitor Visa No. (or Alien Registration No.):

8. Date of visa expiration:

9. Exchange Program Affiliation(s) & No.(s):

10. Was exchange visit supported by U.S. and/or own Government funds? If so, please explain:

11. Immigration and Naturalization Service Office:

12. Has Individual or Employer Filed Third Preference Visa Petition? (INS Form I-140

If so, where and when?

13.

U. S. Entries:			U. S. Departures:	
Date	Place	Type of Visa	Date	Place

14. Country of last foreign residence before U. S. admission:

15. Occupation:

16. Major field of activity (i.e., Education, Engineering, Natural or Physical Sciences):

17. Education and Professional Training (College, postgraduate, other):

Name & Location of Institution	Dates Attended	Degree(s)

18. Experience (Start with Current Assignment and work backward):

Name & Location of Organization	Period of Service	Nature of Assignment

19. List significant publications (if required, copies will be requested):

20. Family (if married, list dependents):

Name	Date & Place of Birth	Nationality	Visa Status while in U.S.
Spouse:			
Children:			

21. Current Home Address:

22. Current Office Address:

23. Has Waiver Application been made in another Federal Agency:

If so, give date and results (use separate sheet if explanation of denial would be relevant to this review.)

24. Has concurrence to proposed waiver been secured from Exchange Visitor Program sponsor? (Please attach comments of Exchange Program official if available.)

25. When both husband and wife are exchange visitors in their own right (i.e., each has J-1 (exchange visa) status, a separate application should be completed for each.

III. Basis for Waiver Application

26. Please present, in an accompanying letter, a description of the individual's special qualifications and experience for contributing to programs of official interest to the Department of Defense in terms of criteria and considerations set forth in the Defense policy and procedure statement. Where applicable, identify contracts or grants by title, number, source and responsible contracting official.

WASSERMAN & CARLINER
Washington 4, D. C.

March 9, 1966

The Secretary of Defense
Department of Defense
Washington, D. C.

Re: Defense Language Institute
Bong Lehac

Dear Mr. Secretary:

I am writing you to call your attention to what appears to be an egregiously indefensible decision by the Defense Language Institute, acting upon the recommendation of the Office of International Training Division of the Agency for International Development, and a parallel decision by the Office of Defense Research and Engineering, with regard to the services of an instructor in the Viet Namese language.

The instructor in question is Bong Lekhac, a native of Viet Nam, who entered the United States under the Exchange Visitor Program to pursue post graduate training in education and linguistics at Teachers College, Columbia University. His status as an exchange visitor expired in 1963, but Mr. Lekhac nonetheless remained in the United States to teach Viet Namese for various government agencies. From April, 1963, to June, 1964, he was employed by the Foreign Service Institute, in 1964 by the Voice of America, and he is presently employed as a Viet Namese language instructor by the Defense Language Institute.

In order for Mr. Lekhac to continue to remain in the United States, in view of his circumstances, it is necessary that he be granted a waiver of the requirement under Section 212(e) of the Immigration and Nationality Act that he reside abroad for a period of two years.

Such a waiver can be granted if it is found to be in the public interest. Your office has on many occasions initiated such waiver requests for persons whose services were deemed to be necessary for the national defense.

There is no question that Mr. Lekhac's services are presently urgently needed in connection with the training of personnel for duties in Viet Nam. This has been attested to by the request that he be retained by the Far East Division of the Defense Language Institute. That office has described Mr. Lekhac's command of Viet Namese, English, and French as "excellent", his classroom performance as "superb", his teaching methodology as "versatile", his work as "conscientious", and his personality as "likeable". It has stated that the Institute is in "desparate need of Viet Namese instructors".

Notwithstanding what is plainly a basis for an appropriate, indeed, an essential request, by the Defense Language Institute to retain Mr. Lekhac's services as an instructor, that agency has chosen not to initiate the action necessary to seek a waiver of the requirement that Mr. Lekhac leave the United States. As a result, Mr. Lekhac's employment as a Viet Namese Language instructor has been terminated by the Staff Civilian Personnel Division effective March 15, 1966.

I have been informed that the Department of Defense has been guided in its decision by the position taken by the International Training Division of the Agency for International Development and of the Viet Namese Embassy. The Agency for International Development, which financed Mr. Lekhac's study at Columbia University, believes that he should return to Viet Nam to teach Viet Namese. The Viet Namese Embassy opposes Mr. Lekhac's continued presence in the United States for its own political reasons.

Neither of these reasons seems relevant to a decision which must be made by the Secretary of Defense to determine whether Mr. Lekhac's services are necessary in the public interest of the United

States. In view of the acute need for Viet Namese language instructors by the Department of Defense, it is urged that the decision to terminate Mr. Lekhac's services be withdrawn and that the necessary request be made that Mr. Lekhac be relieved of the requirement that he depart the United States for a period of two years.

It may assist you in rendering your decision to know that in no event does Mr. Lekhac plan to return to Viet Nam at the present time. Prior to his departure for the United States, he had been banished by the Viet Namese authorities to an isolated area because of public criticism of the government. If he is required to leave the United States he will take up residence in a third country. Thus, if the position the Agency for International Development and of the Viet Namese Embassy is acceded to by your office, only the United States will be disadvantaged by having lost the services of a person who is concededly an exceptional public servant.

Because Mr. Lekhac's services have been terminated effective March 15, 1966, it is requested that this request be given urgent attention.

Respectfully yours,

DAVID CARLINER

Copies to: Honorable David E. Bell
Administrator
Agency for International Development
Washington, D. C.
Honorable Thomas D. Morris
Assistant Secretary of Defense (Manpower)
Department of Defense Washington, D. C.
Mr. John S. Foster, Jr., Director
Defense Research and Engineering
Department of Defense
Washington, D. C.

Mrs. Astrid Kraus
Executive Assistant
Office of Defense Research and Engineering
Department of Defense
Washington, D. C.
Mr. William J. Homan, Chief
Recruitment and Examinations Section
Staff Civilian Personnel Division
Department of Defense
Washington, D. C.
Captain John Greinwald
Secretary, Defense Language Institute
Department of Defense
Washington, D. C.

OFFICE OF THE DIRECTOR OF DEFENSE RESEARCH AI. ENGINEERING
WASHINGTON, D. C. 20301

18 March 1966

Mr. David Carliner
Wasserman & Carliner
Counselors at Law
Warner Building
Washington 4, D. C.

Dear Mr. Carliner:

I have been asked to reply to your March 9, 1966 letter to the Secretary of Defense relating to a determination made in this office that the Department of Defense should not request a waiver of the foreign residence provision of Section 212(e) of the Immigration and Nationality Act in behalf of Mr. Bong Lekhac, a Viet Namese exchange visitor teaching in a Defense Language Institute (DLI) East Coast program.

I believe you are familiar with Defense policy and procedure on waiver requests and received a copy of the enclosed policy statement prior to review of a waiver application you submitted to our office in 1965. When you discussed Mr. Lekhac's situation with Mrs. Astrid Kraus on March 2, 1966, you were informed that DLI in early February had requested our assistance in securing a waiver for Mr. Lekhac and that our review resulted in a determination that a valid waiver request could not be made to the Department of State in this case. In view of the urgent need for Viet Namese instructors, this decision was reluctantly reached after a careful assessment of all relevant factors.

An important factor in this decision was Mr. Lekhac's status as a participant in an official exchange visitor program of the U.S. Government. Both Defense policy and an Interagency Agreement (Foreign Affairs Manual Circular No. 292), to which Defense is a signatory, require the concurrence of the sponsoring Federal agency to a waiver request by another interested Federal agency. As an AID grantee selected by his own government for U.S. training, Mr. Lekhac has a special obligation to honor his return-home commitment. Since his AID support was terminated in April 1963, AID and the Embassy of Viet Nam sought to secure his return to Viet Nam after the birth of his child and an adverse decision on his own exceptional hardship waiver application.

Both in our original waiver review requested by the Defense Language Institute and in the current re-assessment of the merits of a waiver in response to your letter, we find that AID, the Department of State and the Viet Namese Government stand firmly opposed to a waiver on program, policy and foreign relations grounds. If Viet Nam needs Mr. Lekhac's services in a military or civilian capacity in support of Joint U.S. - Viet Nam objectives in Viet Nam, in our judgment this requirement must take precedence over Department of Defense needs for his language instruction services here. In another AID grantee case considered recently, both AID and the Viet Namese Embassy gave written concurrence to our waiver request to help enable the Defense Language Institute to meet its urgent Viet Namese Language requirements in a prime program area.

You report that Mr. Lekhac would take up residence in a third country rather than return to Viet Nam at the present time. Unless there is a genuinely valid basis for such a decision on Mr. Lekhac's part, this would, in view of U.S. commitments in Viet Nam, reinforce rather than alter the judgment that a waiver would not be in the U.S. national interest. Your reference to Mr. Lekhac's banishment by the Viet Namese authorities to an isolated area because of public criticism of the government in power prior to his U.S. admission in 1950 introduces a factor that has not, to our knowledge, been previously raised. You may wish to bring any relevant information you have on this matter to the attention of the Desk Officers in AID and the Department of State who would be competent to evaluate the facts and the effect of such a situation on AID's present position with respect to a waiver. Under our working relationship with AID and State, we are notified of any change in their position in a case of interest to the Department of Defense.

Sincerely yours,

/s/ Wm. J. Ely

Wm. J. Ely
Lt. General, USA
Deputy Director
(Administration and Management)

[G. EXH. 13]

1. COOPERATING COUNTRY: Viet-Nam
2. PROJECT NO.: 420-65-153-1-10137
3. PROJECT TITLE AND SUBTITLE AS AMENDED: Expansion & Improvement of Secondary Education (English) (FY-61).
4. AUTHORIZATION NUMBER AND DATE: 72-13-1096
5. ALLOTMENT NUMBER AND SYMBOL: 120-50-430-03-69-11 ☐ WASHINGTON ☒ USOM
6. PURPOSE: AMENDMENT NO. 1
7. TRANSFER TO BE BY: ☒ U.S. ☐ OTHER
8. NO. PARTICIPANTS: 3
9. DESIRED STARTING DATE: N.A.
10. DURATION (YEARS): 12

A. U.S. CONTRIBUTION	PREVIOUS TOTAL (A)	INCREASE (B)	DECREASE (C)	TOTAL TO DATE (D)	E. COUNTRY CONTRIBUTION $1.00=
(1) Total	18,000		4,500	13,500	
(2) Int'l. Travel (Dollar Exp. Country)					
Other (a) U.S.	18,000		4,500	13,500	
(b) Dollar Country					

F. AUTHOR-IZED AGENCY	TYPE OF EXPENSE	PREVIOUS TOTAL (A)	INCREASE (B)	DECREASE (C)	TOTAL TO DATE (D)
(a) USOM	INTL. TRAVEL				
	MGMT. ADVANCE				
(b) PCC/W					
(c)					
(d)					

G. TYPE OF ASSISTANCE	SYMBOLS	AUTH. AGENCY	UNIT	AMOUNT
TECH. ASSOCIATION				

Per ICAO 1261

H. SPECIAL PROVISIONS: T.S.D.: N.A.

Purposes of amendment: 1) To delete Ta-Tic-Thang from the PIO/P in accordance with ICAO A-1683 dated April 7, 1961. 2) To decrease the number of participants from four (4) to three (3). 3) To readjust figures accordingly.

Names of participants: Miss Tran Thu Lan
- Than Thi Hong
Mr. Le-Khac-Dong

Date: 5/11/61

The signature of an authorized officer of the cooperating country covering this part is on file in the USOM Files [illegible]

BY: USOM Div. — USOM CLEARANCES: Chief, Program Office — DATE: 5/11/61

DATE OF ORIGINAL ISSUANCE: May 8, 1961
DATE OF THIS CHANGE: June 12, 1961

FOR THE COOPERATING COUNTRY
The terms and conditions set forth herein are hereby accepted.
Date: [illegible]
Signature: [illegible]

FOR THE DIRECTOR, USOM
Donald Q. Coster
Donald Q. Coster, Deputy Director, USOM/S

...ND-EXT IMPLEMENTATION ORDER Participants ...TIONAL EDUCATION ...TED STATES OF AMERICA	1. COOPERATING COUNTRY Vietnam	2. PIO NO. 1-20-65-253-1-10167
	3. PROJECT TITLE AND SUB-TITLE THEREOF Extension (1) Improvement of Secondary Education (71 61)	

...GRAM ACTIVITY. RELATIONSHIP TO PERTINENT PROJECTS AND ACTIVITIES OF THE AID, USIA, ETC.

Ex. PIO/P 430-65-153-1-00325

...ROLE OF ... PARTICIPANTS. KINDS OF TRAINING METHOD AND METHOD OF CARRYING OUT. RELATIVE EMPHASIS TO BE GIVEN VARIOUS PHASES. PROBLEMS IN COUNTRY OR INDUSTRY WHICH THIS TRAINING IS INTENDED TO SOLVE.

Participants:

Mme Tran Thu Lan	(New York University)
Mme Than Thi Hong	(Columbia University, Teachers College, New York)
M. Le Chau Hong	(" " " " ")
	(" " " " ")

Extension of one year ; provided contingent upon receipt of grades and recommendations from ICA/Washington.

...MUNICATIONS FOR DISSEMINATION AND USE OF KNOWLEDGE GAINED. CIVIC DETAILS

...their return from their studies abroad, the participants will teach English in secondary schools or teacher training institutions. If they have been able to get an advance degree, they would qualify for teaching posts in higher institutions or with the Department of National Education. Their knowledge and experience would enable them to act as leaders and consultants in English language workshops and conferences held for the in-service training of secondary school teachers in this subject area.

...WHETHER EMPLOYMENT ASSURANCE HAS BEEN GIVEN THE MISSION THAT THE APPLICANT(S) WILL, UPON COMPLETION OF THE ...WILL RETURN TO A POSITION AT LEAST A SIMILAR POSITION OR A SUPERIOR ONE IN THE SAME ... TYPE OF ACTIVITY.

...Department of National Education has agreed to employ the participants, upon their return, in their current positions or higher ones if and when ... possible. The participants have signed contracts to serve with the Department of National Education for two-year period.

(a) [x] PARTICIPANT [ ] DEPENDENT

(b) CURRENT OCCUPATION: 5-7 teacher

(c) TECHNICAL AREA:

2. PROJECT: Expansion & Improvement Secondary Education (FY

3. PROJECT NO.: 430-65-153-1-00305

4. COUNTRY: Vietnam

5. PROPOSED STARTING DATE: July 1960

6. DURATION OF VISIT (Months): U.S.: ; Third Countries:

7. DATE SENT: June 3, 1960

8. PARTICIPANT PERSONAL HISTORY (To Be Completed By Participant — See Separate Instruction Sheet).

(Family)	(First)	(Middle)	SEX
LE	Le	Khac	[X] Male [ ] Female

(Present Address) (No. & Street)	(City or Town)	(Country)
32 Nguyen Trung Truc	Nha Trang	Vietnam

9. DATE OF BIRTH (Day, Month, Year)	10. PLACE OF BIRTH (City & Country)	11. CITIZENSHIP OR NATIONALITY
7-17-1922	Thua Thien, Center Vietnam	Vietnam

12. IN CASE OF EMERGENCY NOTIFY: NAME	DATE OF BIRTH	PLACE OF BIRTH	CITIZENSHIP
HUNG Cong Ton Nu Tui	1906	An Cuu, Thua Thien	
(Relationship) TUONG Le Khac	58 years old		

13. PERSON AT HOME TO BE NOTIFIED IN CASE OF EMERGENCY (Name, Address and Relationship)

Le Khac Tuong, 36/46 Co Bac, Saigon (father)

14. NAME AND ADDRESS OF TRAINING TO BE REPORTED TO ON ARRIVAL (Name, Address and Telephone)

Vietnamese Embassy in Washington

15. HAVE YOU EVER LEFT ABROAD? YES [X] NO [ ] If yes, complete the following:

COUNTRY	DATES FROM	DATES TO	PURPOSE (If for Training, Name Sponsor — ICA, UN, etc.)
France	1952	1955	study tour
Spain, Italy, Etc.			tourist

16. HAVE YOU EVER APPLIED FOR ANY OTHER TRAINING OR EDUCATIONAL PROGRAMS ABROAD?

YES [ ] NO [X] DATE OF APPLICATION: SPONSOR (ICA, UN, ETC.):

17. (a) LIST MEMBERSHIP IN EDUCATIONAL, PROFESSIONAL, AGRICULTURAL, LABOR OR OTHER ORGANIZATIONS

Member of Vietnamese American Association

(b) ARE YOU AN OFFICER IN ANY ORGANIZATION? YES [ ] NO [X] IF YES, EXPLAIN:

18. (a) EDUCATION: YEARS COMPLETED: ____ LIST BELOW ALL SCHOOLS AND INSTITUTIONS (EXCEPT PRIMARY). ALSO LIST CORRESPONDENCE WORK.

SCHOOLS ATTENDED	TYPE	COURSE OF STUDY OR MAJOR	DEGREES, DIPLOMAS OR CERTIFICATES	DATES FROM	DATES TO
Hue High	high school	philosophy	baccalaureat II	1945	1952
Faculties of Letters and Law, Montpellier, France	university	letters & law	certificates	1952	1955

[illegible]	DATE OF BIRTH: 3-27-1932	COUNTRY: Vietnam	PID NUMBER: 430-65-153-1-00325

(1) PRESENT OR LAST PAID POSITION

Teacher at Vo Tanh school, Nha Trang

DATES EMPLOYED: FROM: 1957 TO: PRESENT

NAME OF FIRM (OR INSTITUTION, ETC.) NAME AND ADDRESS

Ministry of National Education

EMPLOYEES SUPERVISED BY YOU: NUMBER: | KIND:

BUSINESS OR ORGANIZATION	SIZE (Approximate Number of Employees or Volume of Business)	KIND (Foundry, Milk Marketing, Vocational Education, etc.)	MACHINES OPERATED

DESCRIPTION OF YOUR DUTIES

Teaching French, English

(2) WHAT ADDITIONAL DUTIES WILL YOU HAVE UPON YOUR RETURN? IF YOU ARE TO HAVE A NEW POSITION, HOW WILL IT DIFFER FROM YOUR PRESENT JOB?

Expecting to teach higher grades

(3) PREVIOUS POSITION

student

DATES EMPLOYED: FROM: | TO:

NAME OF EMPLOYER (FIRM, GOVERNMENT AGENCY, ETC.) NAME AND ADDRESS

EMPLOYEES SUPERVISED BY YOU: NUMBER: | KIND:

BUSINESS OR ORGANIZATION	SIZE (Approximate Number of Employees or Volume of Business)	KIND (Foundry, Milk Marketing, Vocational Education, etc.)	MACHINES OPERATED

DESCRIPTION OF YOUR DUTIES

(4) SPECIAL KEY FACTS, SKILLS, QUALIFICATIONS, ETC. (LIST LABORATORY COURSES, LICENSES, HONORS, PATENTS, PUBLICATIONS, ETC.)

(5) VOCATIONAL INTEREST (HOBBIES, SPORTS, ETC.)

(6) READ AND CAREFULLY

BEFORE SIGNING THIS FORM CHECK BACK OVER IT TO MAKE SURE THAT YOU HAVE ANSWERED ALL QUESTIONS CORRECTLY.

I CERTIFY that I have reviewed the statements made in this application, and that they are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I further agree that if I am accepted under this program, I will follow diligently the program arranged as requested by my government and will not seek alteration of the period of my program. I further agree that upon completion of my training, I will return to my country without delay and will endeavor to utilize, for the benefit of my country, the training received under this program.

signed in draft blanks
SIGNATURE OF PARTICIPANT

June 3, 1960
DATE

AID/W (1-59)

[illegible]	3-27-1930	Vietnam	430-65-153-1-00[illegible]

[illegible] (Use this space to explain answers to any blocks on pages 1 and 2 for which sufficient space was not provided. Give number of the block(s) continued.)

IV. FOR STATE USE
(To be completed after participant has completed PART II above)

10a. [illegible] LANGUAGE CLASSIFICATION:

b. AULC TEST: GIVEN ☐ NOT YET GIVEN ☒ WAIVED ☐

A. [illegible], BY WHICH TEST FORM USED _____ (A, B, C, etc). SCORE: WRITTEN _____ ORAL _____

IS RETEST NECESSARY? ☐ YES ☐ NO. INDICATE APPROXIMATE DATE TEST RESULTS TO BE REPORTED _____

B. IF TEST YET GIVEN, INDICATE APPROXIMATE DATE TEST RESULTS TO BE REPORTED 3 weeks before starting dat

C. IF "WAIVED", INDICATE REASON _____

D. IF ENGLISH LANGUAGE TRAINING TO BE GIVEN: ☐ In Host Country (Approximate Length) _____
☐ Refresher Training in U.S. (Approximate Length) _____

c. COMMENTS (Expansion of item 8 above and/or complementary information):

11. OTHER FOREIGN LANGUAGE PROFICIENCY (IF REQUIRED FOR THIRD COUNTRY TRAINING) (Indicate competence e.g. fair, good, etc.)

LANGUAGE	RATING	READING	SPEAKING	UNDERSTANDING

12. DEGREE EQUIVALENTS: GIVE U.S. EQUIVALENT OF HIGHEST DEGREE IN BLOCK 12 (BA, BS, MS, PHD, etc.) NONE ☐

Acting Training Officer — OFFICIAL TITLE

T. Lucke — SIGNATURE OF OFFICIAL

June 3, 1970 — DATE

(OVER)

NOTE USAID: Format to code Country of Training copies required by Manual Order 1312.2

JA 49

A13 433 125

March 5, 1965

Director, Visa Office
Department of State
Washington 25, D. C.

Dear Sir:

With reference to a cable from USOM/Saigon, dated December 17, 1964, addressed to the Agency for International Development concerning Vietnamese exchange visitors, this office desires to advise you that Dong Lekhac applied for a waiver of the two year foreign residence requirement of section 212(e) of the Immigration and Nationality Act. It has been determined that the exceptional hardship has not been established in this case.

You are requested to advise whether the Department of State desires that this alien be required to depart from the United States, which would be an exception to the present Service policy of permitting such persons to remain pending the completion of a study concerning section 212(e) cases which are not found to be approvable.

Sincerely,

William P. O'Brien
Acting District Director

CC: Associate Deputy Regional Commissioner, Operations
Richmond, Virginia Reference your SE 214j.1-C

SFS:lsa

JA 50

DEPARTMENT OF STATE
BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS

MAR 2 6 1965

Dear Mr. O'Brien:

Reference is made to your letter of March 5, 1965, concerning the case of Bong Lekhac, A13 433 125.

Your letter has been referred to the appropriate officials in the Agency for International Development for an expression of opinion on the point raised in your last paragraph. Immediately on receiving their views, I will furnish the Department's reply.

Sincerely yours,

Culver E. Gidden
Chief, Facilitative Services Staff

Mr. William P. O'Brien,
Acting District Director,
Immigration and Naturalization Service,
312 Old Post Office Building,
12th & Pennsylvania Avenue, N.W.,
Washington, D.C. 20536.

JA 51

DEPARTMENT OF STATE

FORM TELEGRAM

UNCLASSIFIED
CLASSIFICATION

21119

1-30

RR RUEHC
DE RUMJIR 1454A 26/0600Z
ZNR
R 260555Z
FM AMEMBASSY SAIGON
TO SECSTATE WASHDC TOAID 4032
INFO STATE GRNC
BT
UNCLAS APRIL 25

65 APR 26 AM 2 34

SUBJ: LE KHAC BONG 430-20215

REF : AIDTO A 1833

1. MISSION CONCURS INS FINDING, INSUFFICIENT CAUSE FOR WAIVER.

2. REQUEST AID/W SUPPORT IN RETURNING OVER-DUE PARTICIPANT SOONEST BY ANY MEANS NECESSARY.

3. EMPLOYMENT NO PROBLEM, VIETNAM SCHOOLS IN CRITICAL NEED OF PERSONNEL.

4 PLEASE ADVISE ETA. TAYLOR
BT
CFN 4032 26 430-20215 A 1833 1. 2. 3. 4.

End to Mrs Kraus
DOD 3/1/66

UNCLASSIFIED
CLASSIFICATION

JA 52

DEPARTMENT OF STATE
BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS

[illegible] 9 18

[illegible]

MAY 25 1965

Dear Mr. Barton:

Further reference is made to your letter of March 5, 1965, concerning the case of Bong Lekhac (Le Khac Bong), A13 433 125.

The Agency for International Development requests that the alien's application for a section 212(e) waiver be denied and that he be obliged to fulfill his commitment to return to Viet Nam where his services are critically needed. The Department is of the opinion Mr. Bong should be required to depart from the United States in spite of the present Service policy of permitting such persons to remain pending the completion of a study concerning section 212(e) cases which are found not to be approvable.

Please advise concerning the action taken so that return travel can be arranged.

Sincerely yours,

For the Secretary of State:

Culver E. Gidden
Chief, Facilitative Services Staff

Mr. Lewis D. Barton,
District Director,
Immigration and Naturalization Service,
312 Old Post Office Building,
Washington, D. C. 20536

cc: Mr. Joseph W. Hughes, Acting Chief,
Agency for International Development.

JA 53

A13 433 125

August 16, 1965

Mr. Bong Lekhac
618 - 23rd Street, NW.
Washington, D. C.

Dear Mr. Lekhac:

This refers to your application for a waiver of the foreign residence requirement of Section 212(e) of the Immigration and Nationality Act, as amended, based on the hardship which would result to your wife by your compliance with this requirement of law.

Cases involving exchange visitors who marry United States citizens during their temporary stay in this country present many difficulties for all concerned. In support of your application, you state that if you return to Viet-Nam, the country of your nationality and last residence, your wife would not accompany you, you would be drafted into the army, and you would not be allowed to leave the country. Because of these factors, you feel that if you depart the United States, your wife would divorce you. Also, you could not earn sufficient income in Viet-Nam to support your wife in the United States while providing for your own necessities and, as a result, she would have to find employment.

It is noted that your wife left you 8 months ago and is residing with her mother and father in New York. She is employed, has contributed no money to assist you in your financial difficulties, and has seen you only twice since the separation.

The statute provides that a waiver on hardship grounds may be granted only if the exchange alien has a United States citizen or lawful permanent resident spouse or child and compliance with the foreign residence requirement would impose exceptional hardship upon such spouse or child. Since an exchange alien must have a United States citizen or lawful permanent resident spouse or child to be eligible to apply for a waiver, certain personal hardships are inherent in every case in complying with the 2-year foreign residence requirement.

Your wife left you by choice 8 months ago and appears to be subsisting satisfactorily without you, and therefore the elements which would constitute extreme hardship to her if you should return to Viet-Nam could hardly be present in your case. The hardships which you might incur in Viet-Nam, while possibly of an exceptional nature, would not be inflicted on your wife.

In determining whether hardship would be exceptional, this Service must consider House of Representatives Report No. 721 dated July 17, 1961, prepared by Subcommittee No. 1 of the Committee on the Judiciary, on the "Immigration Aspects of the International Educational Exchange Program". On page 121 of the report, the Subcommittee reiterates and stresses the fundamental significance of a most diligent and stringent enforcement of the foreign residence requirement. The report states, "It is believed to be detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers, including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from this country would cause personal hardship".

The factors in your case have been carefully considered. From the foregoing, it has been concluded that the hardships you have set forth constitute the usual hardships which could be anticipated, rather than the exceptional hardship contemplated by the statute. It has been determined that the strict demands of the statute have not been met and that exceptional hardship has not been established in your case.

Sincerely yours,

DISTRICT DIRECTOR

SFS/bc

2/8/66

cdr. Hill - CO - DLI - East Coast
x 52395

Bourq Li Khac (K) #1D. Deaths
3/17/32 Nha-Trang, S-V-N
Capt. Alford asked about procedure
for w—. In #1D people...
would like to pursue now -
can Graduate employment -
is better than others in dept -
& is willing to work with
DLI to TEXAS.
Hx Back - 1952 (From SF 57)
'52-'54 Montpelier, Fr —
Teacher in U-N College
1960-63 Linguistics Tr'g -
Teacher College, Col —
Entered U.S. - 1960 —
Hill talked to Mr. Jeff, INS Depart.
Offr - Got impression #1D
not pressing to return
& is willing to be able to get work -
Read recom. from Head - Far East Div. etc -
Instructor - Shelf rated - prior FBI & VOA Exp

2/8/66 Hill-DIHEC (2)

Married to U.S. citizen Linda Lee Friedman
6/8/41 Brooklyn —.
515 Avenue I
Brooklyn, N.Y.
Boy lives at 618 23rd NW w. D.C.

Capt. Alford will get 310 no. recall-
will also ask if I-12 filed -
when — where if Status -

Check A+D - Russler
" INS - Hoff
" FSI - Jordan

JA 57

2/8/66 Quick
2/8/66 Rush via cable

2/14/66 Dept. - NC
to USIA

WAIVER REQUEST - SECTION 212(e)
IMMIGRATION AND NATIONALITY ACT:
FACT SHEET

(Date)

1. Name: Mr. Bong ~~Dinh~~ Khac le

2. Date & Place of Birth: March 17,1932 Nha-trang, South Viet Nam

3. Nationality: Viet Namese 4. Passport No.:

5. Exchange Visitor Visa No. & Date of Expiration: PIO/P 430-N-69-AI-1-202

6. Exchange Program Affiliations & No(s).: AID

7. Was exchange visit supported by U.S. or own Government funds:

If so, please explain:

8. Immigration & Naturalization Service Office: Washington, D.C INS File No.: A 13 433 125

9. Has Petition been filed to accord alien first preference quota status (INS Form I-140)?:
If so, where and when?:

10. U.S. Entries:

Date	Place	Type of Visa:	Departures: Date	Place
1960				

11. Country of Last Foreign Residence: Viet Nam

12. Occupation: Viet Namese Language Instructor 13. Major Field of Activity: Education

14. Professional Training and Experience Summary:

15. Marital Status: married Family: (Name (including maiden name of wife), Date & Place of Birth, Nationality, Visa Status while in U.S.)

Wife: Mrs. Linda Ina Friedland Le Khac, Born June 8,1941 Brooklyn,N.Y,

16. Home Address:
618 23rd Street,N.W.
Washington,D.C.

17. Office Address:

Fuller-Hill

18. Has waiver request been made to another Federal Agency?: If so, please give date and results (Use separate sheet if explanation of denial would be useful for this waiver).
May have filed I-612 in view of U.S. wife-Mr.Goff,Deportation,Washington INS; has case-says (to DLI) that AID not pushing for his return.

19. Description of alien's qualifications for Defense work and of way work will contribute to program of official interest to the Department of Defense: (Please prepare on separate sheet.)

20. Has concurrence to proposed waiver been secured from Exchange Program sponsor?: (Please attach comments of Exchange Program official if available).

ii. DLI one math - 2yrs' Afo applied - working
FSI - commercial schools.
Considerable difficulty - over-all Econ contact pol.

2/8/66

Re: Bourg Le Khac

Granville Brooker — 12 Dec 21 Oct 64 w/c.

PIO/P 430-N-68-HI-1-20215

Knows of case but Counseling Br- is handling & dealing w- IND. Case returned to Counseling when B- filed for exceptional leadership waiver — which was disapproved by HQ, State + IND. Probably under lack of control. PB had call from Embassy 3 weeks ago — Bourg is wanted for questioning in U-N-. Will ask someone from Counseling to call — discuss details- Bourg has tried everything poss- to stay-

2/9/66 128 X-21423 Re: Khac

A.I.D. Miss Kay Compton - Counselor Bo

Boug 3 yrs long tile
Entry - 9/1960 - for secondary ed - teacher's hosp
in Engl. Dept - July '63 - dropped from program
for unsatisf. perf - did not
place in other schools - was supposed to
go home in Nov. but married
U.S. citizen + asked to stay
until baby born - V.N. Emb. agreed
- went to work for FDI -
many cables re financial support -
program
Son born in Sept - A.I.D. transferred
Vol. Agency - applied INS for hosp.
in returning B- to V.N.

PIO-P- has Eq - in other file -
will get & call back -
Had been wkg for DI Nat'l Ed -
visa applied. D- applied to
Consloc upon return. I- signed
Bilateral sheet - usual agreement w.
I.V. Offr. to return upon completion of
Program -

2/8/66
Compton (2)
Never — recd BP objection — Deportation
Dealing w. Mr. Goff - INS - 187-2850
Goff reports possible divorce
Mr. Twi & Embassy in touch w.
AID & INS - FUN wants return
4/26/65 Mission rept - "return
foreseen by Emb. upon pos-
Employment w.o.D. -
Requested flights for return ticket
put on tight control.
will c. on P.I.O.
AID will oppose any waiver
- been trying to return kids
to FN for 3 yrs -
Emb. wants return - has not
fulfilled mil. service.

219/66

Mr. Patt - Coopl. INS - 187 x2850 - w.c.

2/20/ Mr. Patt — Has file & action on vol. dep. — Sh. have left and 2 dec —. 21 (e) hardship pleaded as basis for ADD position. Fiddler agreed to Marry Separated from work if not divorced — Since did not return voluntarily, deport - proceedings will begin.

2/11/ ... Herold - 182 x7291

Checked: Bond Lehman file - confirmed Fiddler's statement that waiver be denied in view of ADD position. Not a Fiddler Ltr to INS. 0 - 3/25/65.

2/10/66

Buyer- S/C/P — i.e.
Bang given accepted applnt,
Sched. A - C.S. Reg. 213.3107(g)(3)
eod — 1/18/66 —.

1) Did ask Bang about visa status -
assured her. no prob - on appt -
if employed by government -
2) Vouchers ok - incl. FSI -
3) Had been working for other
U.S. agencies -

2/14/66

Pass file Sly - Re: Burg le Khac w- determin.

1) Contrary to spread Procedure, DLI-EC hired Burg w/o prior DDR+E clearance - probably due to change in officer personnel & urgent need for trackers.
Apparently DLI-EC unaware Burg was AWOL from 5/C/P apparently did not check. visa status because of several yrs prior record & work with DLI, i'OA. Acc. to 5/C/P (Boyer) Burg said there w'd be no problem on status if hi worked for DLI.

2) EOD - 1/18/66 - noted highly at DLI-EC. Burg failed to disclose visa problem - known all) & subsequently urging to get him returned to Saipan - val. dep. date of 12/28/65 - had passed & next step would be hearings (INS) to "show cause" that should not be deported.

2/14/66
Sig (2)

3) clear documentary evidence in #11 (w ~~Sig~~ proc), Embassy & State (CU) that all will be strongly opposed to any D— w— request to retain Boug as of D L.i.
Acc. to #11, critically needed in V.N Schools
Acc. to Embassy, needed for mil. service
Exceptional hardship waiver: clerical — no basis stated separation & pending divorce

4) Boug — very poor D— waiver prospect
Failed training program for which came to U.S.
Sought D— employment to avoid returning to V.N for w, or mil. service
#11 has trouble w. non-returning participants & VN has trouble w. mil. service evaders.

2/14/66
E/Q (3)

Bourg case unlike Bisk
Bisk needed to set up
ahead new Crowado
program w. U.P. husband.
Bisk discussed w.
Ambassador — Ltr Q
support received from Embassy
& submitted to State + AID
AID concurred
Bourg case unlike Kirwan + Mikhail,
also AID position. AID first
demurred but on reconsideration
of evidence concurred.
5) With increased mil. & AID
effort in V-N, Bourg will have
US television better in V-N than
of D.C.I.

E/Q agrees no basis for waiver -
discuss w. Hill of DCI-EC.

2/14 - Hill agrees - sorry opposition was
made - will discuss next steps w. S/C/F -
withdrew request for any action for waiver

3/2/66

David Carliner -

New waiver case - V-N- came for language study program - under Diem, required to return for 10 yrs. A.I.D' X- P- Doug LeKhac for Carliner background on our interest in case on behalf of DLI. Poor waiver case - AID contract - facts support AID position - sorry to lose good instructor but no basis for waiver request - DLI request - AID & V-N Embassy count three in V-N - Civ. + mil. service there more imp- than DLI job. Carliner will try to develop approach for waiver & let us know -

3/3/66- Kay Compton -
Carliner may want to discuss - let us know if any change in AID position - wd still have to review mil. service aspect- deportation pending.

3/11/66

Mary Compton —

Callaway Hr — S/D — 3/2 — will try to get Bell ey.

Mr. Jaff — deportation hearing soon — Jan. 18, 1966 — Tri of V-N Embassy called AID Prog. Director — said Boug divorced & wanted in V-N — for mil. Service — Boug told Gov. wanted Mr back.

cable — 4/26/65 — AID Mission to Wash — "Insuffic. cause for removal — return soonest by any means nec. — employment no problem — V-N — schools for critical need personnel." will check all AID files for any mention & trouble re. V-N Gov. & pos. persecution if returned.

3/11 — no mention anywhere in file — it never passed.

3/11/66

Herald - Re: LeMac

CU file - last entry - 5/25/65 -
folder to Boston - deny except
hardship on pet. & AID.
* check file - any mention Polit. Persec.?
7.10.27 / 63 - flunked out - Teachers College
Spring of 1963 - scholastic failure -
dropped from program -
4/1/63 - permitted to remain & com
expense till birth & child -
Stuart Patterson to Fawell
4/1/63 - FSI instructor -
9/64 - Patterson to Fawell
10/22/63 Status rpt
Because of FSI employment,
AID took no further action - now
no longer w. FSI & sh. leave.
Did AID ask FSI to release
LeMac? Why did he leave FSI?
* Not in CU file - ask Jordan-FSI
Mack — 182 X 3931.

1/5/66 FDI - Mrs. Tarabar -
glad to know where address is.
Creditors still awaiting this to hear at
Hosp Dept This week -
worked at FDI as compassionate
case while wife pregnant - problems
from start to finish - obstetrician -
marital - lawyer - mother-in-law
calling Boro Brooklyn.
Very tolerated artist but too
nervous about attend - told to
supervise - when told he will
be terminated at end of two - 6/30/64
resigned instead.
will not return.
OK on lang, instructors of movement

3/15/66 SEND cys of reply to Carliner to AID, INS (Pett) Dept & S/C/P.

Ken Crayton —
Has not yet seen Carliner ltr —
Nothing additional in file —
Mr. Pett — deportation hearing on 3/28 —

C. Fiddler —
Confirms Herold kept on file —
no question of persecution
raised — Polit. Desk w'd
have to doubt Consider.
Policy on AID grantees — AID
position binding on EU — always
send to EU asylum case.
Will send add'l copies. Circular
No. 292 — extravagancy
agreement —

Fm. Meredith — S/C/P — 59687 - 72236.
Talked w. Mr. Pett — no reason not
to continue Baup's employment
at DLI until dep. hearing
on 3/28.
INS ruling best on this — decision N.16
up to INS &/or State. DLI will keep on notice.

JA 72 Re: Bourg Lekhac

3/15/66

Pott - INS - 187 X2850 w.e. back.

Re: Reply to Parker Ltr - sh. go out today.

Anything in INS file on Bourg on pol. persecution mentioned in Parker ltr?

No - never heard of it - did not want to go into Query - wd be drafted if returned. W/s wd divorce - wife had already left him - all in 8/16/65 ltr to Bourg - Read ltr - will send reply -.

Send Mr. Pott copy reply to Parker for his files - may come up in hearings on 25th.

Pass file re reply - ref. 2/14 discussion -
1) No case for D - waiver -
2) Misrepresented visa situation & FBI exp. to Pott Dec I position to mention to U.S.
3) Pos. Polit. Persecution - refer to State Polit. Desk

[G. EXH. 15]

Foreign Affairs Manual Circular

SUBJECT: Formation of Interagency Council on International Educational and Cultural Affairs

No. 165A

January 20, 1964

1. Purpose

The purpose of this circular is to inform personnel of the Department of State and the Foreign Service of the formation of the Council on International Educational and Cultural Affairs (hereafter referred to as the Council) which meets for the first time on January 30, 1964.

2. Functions

a. The Council will focus on strengthening the coordination of educational and cultural policies for Government programs which are essentially international in purpose and impact. Priority attention will be given to better communication among the agencies with programs of this kind and to more effective use of resources through the elimination of any existing overlaps or gaps.

b. In addition, the Council hopes to provide a forum for discussion of problems which affect other Government agencies with domestic programs having international implications. From time to time, representatives of these agencies will be asked to meet with the Council.

3. Membership and Staffing

As the Secretary of State's special representative in this undertaking, Assistant Secretary Battle will act as Chairman of the Council. The complete roster of members is as follows:

(over)

Chairman: Lucius D. Battle, Assistant Secretary of State for Educational and Cultural Affairs.

Dr. Leona Baumgartner, Assistant Administrator for Human Resources and Social Development, Agency for International Development.
(Alternate: Dr. Harold Enarson)

Francis Keppel, U.S. Commissioner of Education, Department of Health, Education, and Welfare.

Edward R. Murrow, Director, U.S. Information Agency.
(Alternate: James R. Echols)

Edward L. Katzenbach, Jr., Deputy Assistant Secretary of Defense (Education), Department of Defense.

Sargent Shriver, Director, Peace Corps.
(Alternate: Dr. J. Norman Parmer)

Irving J. Lewis, Deputy Chief, International Division, Bureau of the Budget (Observer).

Staff: Francis J. Colligan, Executive Secretary (CU/PRS - Ext. 6881).

Mrs. Elinor P. Reams, Assistant Executive Secretary (CU/PRS - Ext. 5902).

(CU)

(NOTE: Number of last circular issued: FAMC No. 165.)

[G. EXH. 16]

Foreign Affairs Manual Circular

SUBJECT: Interagency Cooperative Arrangements Involving the Bureau of Educational and Cultural Affairs

No. 236

September 10, 1964

1. Purpose

a. The purpose of this circular is to establish or reaffirm, as the case may be, certain interagency cooperative arrangements for which the Bureau of Educational and Cultural Affairs has primary responsibility within the Department of State.

b. The establishment of these continuing arrangements is the outcome of an extensive examination by all parties concerned to determine how interagency coordination can be simplified and made more effective.

2. The Council on International Educational and Cultural Affairs

The Council will continue to be the over-all interagency coordinating body for international educational and cultural policy at the sub-Cabinet level, in line with the provisions of FAMC No. 165A of January 20, 1964.

3. Committees of the Council on International Educational and Cultural Affairs

a. A key responsibility of the Council is to act as the parent organization for interagency committees which, at the operating level, deal with matters of direct concern to the Council's work and therefore actually function as an extension of the Council's activities. 1/

1/ Not considered within the Council's committee structure are: (1) private advisory committees, (2) interagency committees with a scope different from that of the Council, and (3) interagency committees involving the Bureau of Educational and Cultural Affairs but established by separate Executive Order or at the instigation of another bureau of the Department of State.

b. The following existing interagency committees will henceforth operate under the aegis of the Council and, in this capacity, keep the Council fully informed of their activities and also carry out such assignments as the Council may request:

(1) Interagency Committee on English Language Teaching: The function of this committee is to develop and maintain a coordinated approach to the teaching of English language abroad.

Membership: Department of State (CU), USIA, AID, Department of Defense, the Peace Corps, and the Department of Health, Education and Welfare.

Chairman: Mrs. Jane M. Alden, Policy Review and Research Staff, CU.

(2) Interagency Committee on University Relations: The job of this committee is to increase the areas of understanding and cooperation between government agencies and universities which collaborate in foreign education and exchange assignments.

Membership: Department of State (CU), AID, USIA, Peace Corps, HEW.

Chairman Pro Tem: Mr. Francis J. Colligan, Director, Policy Review and Research Staff, CU.

Executive Secretary: Mrs. Jean B. Dulaney, Policy Review and Research Staff, CU.

4. Special Interagency Coordinating Committee

CU chairs two other interagency coordinating committees which operate independently and not under the sponsorship of the Council. These are the Interagency Committee on International Athletics and the Interagency Youth Committee.

5. Deactivation of Other Interagency Coordinating Committees

All other interagency coordinating committees established by CU are hereby deactivated. This does not apply of course to private advisory committees nor to interagency coordinating committees involving CU but established at the instigation of another bureau of the Department of State. Nor does this simplification of the committee structure preclude the continuance of informal interagency working groups in which CU is now involved.

6. Establishment of New Interagency Coordinating Committees

a. Except for the Council and the committee arrangements referred to in this circular, formal interagency coordination through the committee mechanism is to be discouraged.

b. Any proposal originating in CU for the establishment of an interagency committee must, in addition to the approvals required in 2 FAM 1632, have approval by the following:

(1) The interagency Council if the proposed committee would deal with matters of concern to the Council and is therefore a potential committee of the Council.

(2) The Assistant Secretary for Educational and Cultural Affairs if the work of the proposed committee does not involve the Council's areas of interest.

7. Improved Operational Liaison

CU area and functional offices will ensure even more effective liaison with their counterparts in other agencies concerned with international educational and cultural activities through improved exchange of information and other cooperative undertakings.

(CU/PRS)

(NOTE: Number of last circular issued: FAMC No. 235.)

[G. EXH. 17]

JA 78

Foreign Affairs Manual Circular

SUBJECT: The Return of Participants in Exchange Visitors Programs

No. 292

March 24, 1965

1. Purpose

The purpose of this circular is to inform personnel of the Department and the Foreign Service of the adoption of an interagency policy by member agencies of the Council on International Educational and Cultural Affairs.

2. Background

a. There has been increasing public concern over the possibility that the various educational exchange programs might be used as channels for immigration.

b. The Department of State made a study of the problem as it relates to participants in Exchange Visitor Programs which are programs officially designated by the Secretary of State and, as such, programs which are designed to further the objectives of the Fulbright-Hays Act. (All Government programs are in this category, as well as many private programs.)

c. The study revealed that, in the Exchange Visitor Programs which involve "J" visas, only a very low percentage of participants have received waivers of the requirement that they return to their own country or another foreign country under special conditions for an aggregate of two years, following their departure from the United States, before applying for immigrant visas, permanent residence, or non-immigrant (H) visas.

d. Despite this good record, the Department of State proposed to the member agencies of the interagency Council on International Educational and Cultural Affairs that more stringent controls be established to guard against any possible future use of Exchange Visitor Programs as channels for immigration.

e. The member agencies of the Council approved the Department's proposal and agreed on the enclosed interagency policy statement.

3. Principal Elements of Policy Statement

In the enclosed policy statement the signing agencies agreed to:

a. Establish Waiver Review Boards or Offices to pass on applications for requests for waivers of the two-year residence requirement for participants in Exchange Visitor Programs.

b. Adopt comparable criteria for the Waiver Review Boards or Offices to use in passing on applications.

Enclosure:

As stated.

(CU/PRS)

(NOTE: Number of last circular issued: FAMC No. 291.)

INTERAGENCY POLICY
ON
THE RETURN OF PARTICIPANTS IN EXCHANGE VISITOR PROGRAMS
(Foreign Visitors with "J" Visas)

1. Public Concern Over Immigration of Educational Exchange Visitors

   a. In a relatively few years the United States has become an educational center for students from the new and developing nations, as well as from other areas of the world. During the academic year 1963-64, some 75,000 1/ foreign students were enrolled in colleges and universities throughout the country--an increase of 45,000 students since 1950-51. 1/ There have also been increases in other categories of visitors who come to the United States for educational, and related purposes, including medical interns, medical residents, nurses, research scholars, and industrial trainees.

   b. As this foreign influx has increased, so has public concern over the question of whether various educational exchange programs are being used, or rather misused, as a channel for immigration.

2. Two Broad Categories of Foreign Visitors

   Consideration of this question must take into account the fact that there are two broad categories of foreign visitors who come to the United States for educational and related purposes:

   a. Those who come under the Exchange Visitors Program and, as such, come under "J" visas and are officially sponsored by a government agency or a private agency or institution whose exchange program has been designated as an Exchange Visitor Program by the Secretary of State. (See Enclosure(p. 7) for the various series of Exchange Visitor Programs).

   b. Those who come to this country "on their own" or under auspices other than the Exchange Visitor Programs.

3. Exchange Visitor Programs (and "J" Visas) - An Overview

   a. Purpose of the Exchange Visitor Program

   Exchange Visitor Programs are provided for in the Mutual Educational and Cultural Exchange Act of 1961 (the Fulbright-Hays Act) as a means of furthering the objectives of the Act. The purpose of an Exchange Visitor Program is defined as follows in the Code of Federal Regulations: 2/

1/ 1963-64 data from Open Doors - 1964, report of the Institute of International Education. 1950-51 data from Education for One World 1950-51, report of the Institute of International Education.

2/ 22 CFR 63.1(c).

"...a program of a sponsor designed to promote interchange of persons, knowledge and skills, and the interchange of developments in the field of education, the arts and sciences, and concerned with one or more categories of participants as defined in paragraph (h) of this section, 1/ which has been designated as such by the Secretary of State, and in actual operation serves to promote mutual understanding between the people of the United States and the people of other countries."

b. Practical Advantages to the Sponsor and the Exchange Visitor

Although the exchange visitor enters the United States for an educational or cultural experience, many are already trained professionals and as such simultaneously make meaningful contributions or render valuable services to the sponsor (professors, research scholars). Others enter into a study-experience situation in which they render some service while gaining practical experience or learning to apply techniques. Under the "J" visa classification, the exchange visitor may be paid and may accept a stipend.

c. Authority of the Secretary of State

Not only is the Secretary of State authorized to make Exchange Visitor Program designations, he may also in his discretion revoke the designation of any Exchange Visitor Program for any sufficient cause, including but not limited to: 2/

a. Failure to maintain educational standards as established by competent professional agencies;

b. Failure to submit reports on program operations when requested by the Secretary of State;

c. Misuse of the Exchange Visitor Program.

d. Two-Year Foreign Residence Requirement

(1) Basic to the philosophy of the Exchange Visitor Programs is the legal requirement 3/ that the Exchange Visitor must proceed abroad for a two-year period upon completion of his stay here (there are limitations on the period of stay for the various types of participants).

(2) Before the Exchange Visitor can apply for an immigrant visa, or for permanent residence, or for a non-immigrant (H) visa, he must reside in the country of his nationality or his last residence (or in another foreign country 4/ for an aggregate of at least two years following his departure from the United States.

1/ Students, trainees, teachers, professors, specialists, research assistants, leaders, and observers; also medical doctors (interns or residents), nurses and paramedical trainees.

2/ 22 CFR 63.2, 63.3.

3/ Section 212(e) of the Immigration and Nationality Act, as amended.

4/ Subject to approval by the Secretary of State.

(3) This two-year requirement is imposed to prevent the Exchange Visitor Programs from becoming a stepping stone to immigration and to insure that the Exchange Visitor makes his new knowledge and skills available to his countrymen and his country and promotes understanding of the United States.

e. Waiver of Foreign Residence Requirement

The Attorney General may waive the two-year residence requirement (and thus permit the Exchange Visitor to apply for an immigrant or non-immigrant (H) visa or for permanent residence) in the case of any alien whose admission to the United States is found to be in the public interest. To be considered by the Attorney General, such waiver requests must be:

(1) Made by an interested government agency in the public interest on the basis of detriment to an activity of official U. S. Government interest; or made by the Commissioner of Immigration and Naturalization if the waiver is requested on the grounds that the Exchange Visitor's departure from the United States would impose exceptional hardship on the alien's spouse or child, provided the spouse or child is a citizen of the United States or a lawfully resident alien.

(2) Have the favorable recommendation of the Secretary of State.

4. Principal Concerns of the Department of State

a. The Department of State has certain general concerns for all foreign visitors who come to this country to pursue programs of education or training. It is concerned, for example, that the foreign visitor's stay here is as meaningful as possible, that it gives him a good understanding of the United States, and that it fits him for more useful service in his own country.

b. The majority of the foreign visitor population is not under the aegis of Exchange Visitor Programs, and the visitor's stay here does not directly involve the Department.

c. By contrast with its general concern for all foreign visitors who are here for educational and training purposes, the Department of State's concern for Exchange Visitor Programs is specific and is a direct outgrowth of its legal responsibilities for the Programs.

d. First of all, the Department of State has a specific obligation regarding Exchange Visitors brought to this country under its own direct sponsorship--an obligation to make their visit as successful as possible and an obligation to see that they return home when their program here is completed.

e. Second, the Department of State has a general responsibility to see that the integrity of all Exchange Visitor Programs is insured.

5. Insuring the Integrity of Exchange Visitor Programs

The record indicates that percentage of waivers of the two-year residence requirement has been relatively low for Exchange Visitors--less than 3% for all Exchange Visitor Programs (both Government and private) and less than 1% for the CU-sponsored Exchange Visitor. Nevertheless, the Department of State has recently made an intensified effort to prevent any possible misuse* of Exchange Visitor Programs by taking the following steps:

Requested, and received, the cooperation of other agency members of the Council on International Educational and Cultural Affairs in establishing comparable interagency criteria and safeguard arrangements for requesting waivers as interested government agencies (see below).

6. Interagency Position and Arrangements for Requesting Waivers

a. The Department of State has proposed, and the interagency Council on International Educational and Cultural Affairs has approved, a strong interagency position on requests for waivers when any member of the Council would be the "interested government agency" to make the requests.

b. Each member agency** of the Council has established an Exchange Visitor Waiver Review Board (similar to the Board established some time ago by the Department of Health, Education, and Welfare) or a Waiver Review Office, in order to insure thorough and equitable evaluations of applications for waiver requests. Requests for waivers of the two-year residence requirement will be made by the Review Boards or Offices of the member agencies of the Council.

c. In each case, each Board or Office will recommend approval for each application for a waiver request individually and in terms of considerations and standards comparable to the following:

(1) Criteria

(a) Importance of the Program or Activity Involved

The services of the individual must be needed in a highly important program or activity of national or international significance in the areas of interest of the department or agency concerned. Evidence indicating the nature, scope, specialized personnel requirements, and national or international interests served by the program will be considered in determining degree of importance.

(*) Channel for immigration.

(**) Except the Peace Corps which at present does not handle applications for waiver requests. If this situation changes, the Peace Corps will establish a Board.

(b) Essential Relationship of the Individual to the Program

A direct relationship must exist between the individual and the program or activity involved, so that loss of his services would necessitate discontinuance of the program, or of a major phase of it. Specific evidence as to how the loss or unavailability of the individual's services would adversely affect the initiation, continuance, completion, or success of the program or activity will be pertinent to this criterion.

(c) Critical Qualifications of the Individual

The individual must possess unusual and outstanding qualifications, training, and experience, including a clearly demonstrated capability to make original and significant contributions to the program.

(2) Other Considerations

(a) Clearance of Application When U.S. Government Agency Officially Sponsors (i.e., Finances) the Exchange Visitor

In the case of an Exchange Visitor who came to the United States on an official Exchange Visitor Program of the U.S. Government, the application should include evidence that the sponsoring Federal agency has agreed to the application being made, or, if it did not agree, the grounds on which it declined to do so.

(b) Additional Relevant Factors

In addition to the criteria listed above, account may also be taken of other factors which are relevant to the interests of the particular U.S. Government agency which is considering the waiver application.

(c) Application of Policy to Spouses and Children of Exchange Visitors

When a decision is made to request a waiver for an Exchange Visitor, a waiver will also be requested for the spouse and children, if any, if they are also subject to the foreign residence requirement.

A separate application form should be provided for each member a married couple in cases where both are Exchange Visitors in their own right (J-1 status), or where the primary grounds for the application is the work of the Exchange Visitor's spouse who is a citizen of the United States or a lawfully resident alien. In such cases, a waiver will be requested if either spouse is found to meet other criteria as relevant.

(d) Waiver Requests Based on Exceptional Hardship

Waiver requests based on the exceptional hardship provision of Section 212(e) of the Immigration and Nationality Act should be made by the alien directly to the nearest District Office of the Immigration and Naturalization Service which has sole jurisdiction in such cases.

7. Notification to Sponsors

All sponsors of Exchange Visitor Programs are to be notified of this inter-agency position and are to be guided by it in making application for a waiver request to any member of the Council, as the interested Government agency.

Clearances by member agencies of the Council on International Educational and Cultural Affairs.

For Dr. Leona Baumgartner: /s/ John F. Hilliard, TCR /s/ Cameron F. Bremseth, A/IT Agency for International Development	March 5, 1965 Date
/s/ Col. J. A. Bowman, USAF Department of Defense	February 23, 1965 Date
/s/ Dr. Francis Keppel Department of Health, Education, and Welfare	February 25, 1965 Date
For R. Sargent Shriver, Jr.: /s/ Dr. Bascom H. Story The Peace Corps	February 24, 1965 Date
For Harry C. McPherson, Jr. /s/ Arthur W. Hummel, Jr. Department of State	March 9, 1965 Date
For Carl T. Rowan: /s/ James R. Echols U. S. Information Agency	February 24, 1965 Date

March 9, 1965.

THE SERIES OF EXCHANGE VISITOR PROGRAMS
(J Visas)

G-I	Programs sponsored by the Bureau of Educational and Cultural Affairs, Department of State.
G-II	Programs sponsored by the Agency for International Development.
G-III	Programs sponsored by the United States Information Agency.
G-IV	Programs sponsored by international agencies or organizations in which the United States Government participates.
G-V	Programs sponsored by national, state, or local governmental agencies.
P-I	Programs sponsored by educational institutions such as schools, colleges, universities, seminaries, libraries, museums, and institutions devoted to scientific and technological research.
P-II	Programs sponsored by hospitals and related institutions not a part of educational institutions.
P-III	Programs sponsored by non-profit associations, foundations, and institutes.
P-IV	Programs sponsored by business and industrial concerns.

Foreign Affairs Manual Circular

SUBJECT: Formation of Exchange Visitor Waiver Review Board

No. 306A

April 29, 1965

1. Purpose

The purpose of this circular is to inform personnel of the Department of State of the formation of an Exchange Visitor Waiver Review Board, in accordance with the terms of Foreign Affairs Manual Circular No. 292 of March 24, 1965.

2. Functions

a. The Exchange Visitor Review Board, hereafter referred to as the Board, shall assume the functions and responsibilities of the informal waiver review committee which was established in July 1963 by the Assistant Secretary of State for Educational and Cultural Affairs. The Board shall insure thorough and equitable evaluations of applications for waivers of the two-year foreign residence requirement for participants in the Exchange Visitor Programs when the Department of State is potentially the requesting, or the interested, Government agency.

b. In passing judgment on such applications, the Exchange Visitor Waiver Review Board shall apply considerations and standards comparable to those adopted by the interagency Council on International Educational and Cultural Affairs and set forth in Foreign Affairs Manual Circular No. 292.

3. Membership

a. The membership of the Board is as follows:

Chairman - John N. Hayes, Deputy Director, Office of U.S. Programs and Service, Bureau of Educational and Cultural Affairs (CU)

Fred T. Teal, Assistant Legal Adviser, Educational and Cultural Affairs, Office of the Legal Adviser (L/CRP)

Culver E. Gidden, Chief, Facilitative Services Staff, Office of U.S. Programs and Service (CU)

b. As appropriate, representatives of CU area offices and the Department's geographic offices will be asked to participate in deliberations of the Board.

(CU/PRS)

(NOTE: Number of last circular issued: FAMC-306.)

[Caption omitted in printing]

[Plaintiff's]
STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. Plaintiff, Le Khac Bong, is a citizen of Viet Nam who was admitted to the United States as an exchange visitor and is now a resident of the District of Columbia.

2. Plaintiff was employed as an instructor in the Vietnamese language by the Defense Language Institute of the Department of Defense on or about January 18, 1966. On or about January 19, 1966, the Immigration and Naturalization Service notified the Defense Language Institute that plaintiff was not an "immigrant" in the United States and that plaintiff's permission to remain in this country had expired on December 26, 1965.

3. Thereafter, on or about January 25, 1966, in accordance with the provisions of 22 U.S.C. 2451, Dr. Julia I. Chen, Chairman of the Far East Division of the Defense Language Institute submitted the following memorandum to the Commandant of the Defense Language Institute in which she stated the desperate need which the Institute had for the plaintiff's services as a Vietnamese language instructor:

> 1. DLIEC is desperately in need of Vietnamese instructors, especially those who can speak South Vietnamese. We have made numerous inquiries and contacted various agencies in search of qualified Vietnamese teachers. None was available because they were in great demand. It was with extreme difficulty that we finally found Mr. Le-Khac Bong who is not only a native of South Vn, but also a highly qualified teacher.
>
> 2. Mr. Bong possesses good academic background. His education includes Baccalaureate, 1952 (South VN); post-graduate studies — law and literature, 1952-54 (University of Montpellier, France); Faculty of Letters

— literature, 1955-56 (Saigon University); education and linguistics, 1960-63 (Teachers College, Columbia University). We only offer him GS7-1. With such a modest salary DLIEC can hardly hire a better educated person. Therefore, we can not afford to lose him.

3. In regard to professional qualifications, Mr. Bong's are more than adequate to meet our instructor's requirements. His past teaching and working experience in other schools and institutions are valuable to DLIEC. He taught Vietnamese, English and French at Vo Tanh College, 1957-60 in South VN. At FSI he taught Vietnamese language from Apr. 1963 to June of 1964. He also was a Vietnamese teacher at Sanz School of Languages. In 1964 Mr. Bong worked for the Voice of America as an announcer and translator. He also passed the examination at Joint Publications Research Service which qualified him as a translator from Vietnamese and French into English. The last mentioned exam alone proves that his command of both Vietnamese and English (besides French) is excellent. Armed with such professional capabilities, Mr. Bong is indeed a hard-to-get addition to the Vietnamese faculty of DLIEC.

4. As far as classroom performance is concerned, Mr. Bong conducts his classes in a superb manner. He is versatile, conscientious and well versed in the employment of good and modern teaching methodology. His students like his personality and deeply appreciate his teaching techniques.

5. Another very important factor is that when DLIEC moves to El Paso, we will definitely lose several Vietnamese instructors who have decided to remain in the Washington area. In fact a VN lady teacher already resigned last month on the ground that she did not want to go to Texas. Since Mr. Bong desires to move with our school to El Paso, we strongly urge that this intelligent, young and able VN instructor be invited to remain in the United States so that DLIEC can be benefited by his invaluable services.

6. Furthermore, Mr. Bong is highly recommended by his colleagues who know him well. It is assured that his devotion to his profession and his cooperation with this school will bring greater success to the Vn-language training of our military personnel at DLIEC.

4. On or about February 6, 1966, the Commandant of the Defense Language Institute asked the Director of Defense Research Engineering, as the designated representative of the Department of Defense for this purpose to request the Department of State to recommend that the Attorney General waive a requirement that the plaintiff reside abroad for a period of two years in order to permit the plaintiff to remain in the United States as a permanent resident to be employed by the Defense Language Institute as a Vietnamese language instructor.

5. On March 24, 1965, the Department of Defense, the Department of State, and the Agency for International Development, among other agencies, entered into an agreement establishing "interagency Policy on the Return of Participants in Exchange Visitor Programs." The terms of this agreement require, as applied to the plaintiff, that the Department of Defense recommend approval of applications for waiver requests upon the following criteria:

(1) Criteria

(a) Importance of the Program or Activity Involved

The services of the individual must be needed in a highly important program or activity of national or international significance in the areas of interest of the department or agency concerned. Evidence indicating the nature, scope, specialized personnel requirements, and national or international interests served by the program will be considered in determining degree of importance.

(b) Essential Relationship of the Individual to the Program

A direct relationship must exist between the individual and the program or activity involved, so that loss of his services would necessitate discontinuance of the program, or of a major phase of it. Specific evidence as to how the loss or unavailability of the individual's services would adversely affect the initiation, continuance, completion or success of the program or activity will be pertinent to this criterion.

(c) Critical Qualifications of the Individual

The individual must possess unusual and outstanding qualifications, training, and experience, including a clearly demonstrated capability to make original and significant contributions to the program.

(2) Other Considerations

(a) Clearance of Application when U.S. Government Agency Officially Sponsors (i.e., Finances) the Exchange Visitor

In the case of an Exchange Visitor who came to the United States on an official Exchange Visitor Program of the U.S. Government, the application should include evidence that the sponsoring Federal agency has agreed to the application being made, or, if it did not agree, the grounds on which it declined to do so.

(b) Additional Relevant Factors

In addition to the criteria listed above, account may also be taken of other factors which are relevant to the interests of the particular U.S. Government agency which is considering the waiver application.

6. On or about February 14, 1966, the Office of the Director of Defense Research Engineering determined that it would not make the request that the Department of State recommend to the Attorney General that the plaintiff be relieved of the requirement that he reside abroad for two years prior to seeking permanent resident status in the United States.

7. One of the factors in the adverse decision is the determination by the Office of the Director of Research Engineering that the Interagency Agreement between the Department of Defense, the Department of State, and the Agency for International Development, requires that concurrence of the Agency for International Development for any request to be made by the Department of Defense for a waiver. Pursuant to this determination, the Office of the Director of Research Engineering, declined to seek a waiver upon a finding that "the AID, the Department of State and the Vietnamese government stand firmly opposed to a waiver on the program, policy, and foreign relations grounds".

8. The decision by the Office of the Director of Research Engineering not to apply for a waiver request on behalf of the plaintiff was not based upon any determination as to the importance of the program conducted by the Defense Language Institute, the essential relationship which the plaintiff has to the program or the critical qualifications which the plaintiff has in contributing to the prog-

9. As a result of the failure of the Director of Research Engineering to seek waiver of the foreign residence requirement imposed upon the plaintiff, the plaintiff is unable to obtain an adjustment of his immigration status so as to be able to remain in the United States as a permanent resident.

/s/ Jack Wasserman

/s/ David Carliner
Attorneys for Plaintiff

[Certificate of Service]

[Caption omitted in printing]

RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Defendant contends that plaintiff's statement of material facts does not accurately state the facts of record in certain particulars, as follows:

4. and 6. Plaintiff states that, on or about February 6, 1966, the Commandant of the Defense Language Institute asked the Director of Defense Research Engineering to request the Department of State to recommend that the Attorney General waive the two-year foreign residence requirement; and that on or about February 14, 1966, the Office of the Director of Defense Research Engineering (ODDR & E) determined that it would not make the request.

Actually the facts are these: On February 8, 1966, the Commandant of the Defense Language Institute informed ODDR & E that he would like to pursue the matter of obtaining a waiver for plaintiff (Gov't. Exhibit 14-1). ODDR & E thereupon made detailed inquiries concerning plaintiff (Gov't. Exhibit 14); and, on February 14, 1966 informed the Defense Language Institute of the results of its consideration of the question of a request for waiver, and that it had concluded that there was no basis for a waiver. The Defense Language Institute agreed, and withdrew the request for any action for the waiver (Gov't. Exhibit 14-11).

5. To the extent that plaintiff implies that the "Interagency Policy on the Return of Participants in Exchange Visitor Programs"

requires the Department of Defense to recommend approval of any applications for waiver, plaintiff is in error.[1]

7. 8. In these paragraphs plaintiff inaccurately describes the basis of the Defense Department's decision that it would not initiate a request for a waiver. As General Ely stated, all relevant factors were considered in reaching the decision. Exhibit 12-10; see Exhibit 14, particularly 14-9 to 14-11, and discussing at page 12 of defendant's memorandum of points and authorities.

9. Plaintiff's inability to obtain an adjustment of his immigration status is not a result of the failure of the Director of Research Engineering to seek a waiver. It is a result of the failure of the Attorney General to grant a waiver; prerequisites of such action are a request by an interested Government agency (such as the Department of Defense), and the favorable recommendation of the Secretary of State.

/s/ David G. Bress
United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Nathan Dodell
Assistant United States Attorney

[Certificate of Service]

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[1]We also note that plaintiff, in his statement of material facts, makes no reference to "Department of Defense Policy and Procedure on Requests for Waiver of the Two-Year Foreign Residence Requirement of the Exchange Visitor Program", Exhibit 12-1, which lists as a criterion "satisfactory clearance with the sponsoring agency." (Here, the Agency for International Development). Exhibit 12-1 was published on November 22, 1963. (The Interagency Policy was issued in March of 1965).

[Caption omitted in printing]

ORDER

Upon consideration of the Defendant's motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted and his alternative motion for summary judgment, it is by the Court this 9th day of January, 1968,

ORDERED, that each motion be and is hereby denied; and

It further appearing to the Court that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation,

IT IS FURTHER ORDERED, that the Defendant may note an immediate appeal from this order pursuant to provisions of 28 U.S.C. 1292(b).

/s/ John J. Sirica
Judge

[Filed February 20, 1968]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 3189 September Term, 1967

Secretary of Defense, Civil No. 2047-66
Applicant

v.

Le Khac Bong,
Respondent

Before: Burger, Tamm, and Robinson,
Circuit Judges, in Chambers.

ORDER

On consideration of applicant's application for an interlocutory appeal, of respondent's answer thereto and applicant's reply, it is

ORDERED by the Court that applicant's aforesaid application be granted and applicant is allowed to appeal in this case.

Per Curiam.

Circuit Judge Tamm would deny applicant's application for an interlocutory appeal.

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,819

SECRETARY OF DEFENSE, APPELLANT

v.

LE KHAC BONG, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
NATHAN DODELL,
Assistant United States Attorneys.

Of counsel:

ROGER A. PAULEY,
Attorney,
Department of Justice.

Civil No. 2047-66

QUESTIONS PRESENTED

In the opinion of appellant, the following questions are presented:

1. Whether the district court has jurisdiction to review the determination of the Department of Defense that it is not in the public interest to request a waiver of the two-year foreign residence requirement of 8 U.S.C. 1182(e) with respect to an exchange visitor admitted for purposes of study or training.

2. Whether, if there was jurisdiction, appellant was entitled to summary judgment.

INDEX

CITATIONS

Cases:

* Cases chiefly relied upon are marked by asterisks.

* Cases chiefly relied upon are marked by asterisks.

Miscellaneous—Continued

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,819

SECRETARY OF DEFENSE, APPELLANT

v.

LE KHAC BONG, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

On August 3, 1966, plaintiff brought an action in the district court challenging the refusal of the Department of Defense, as an "interested agency" under the pertinent statute (8 U.S.C. 1182(e)), to request a waiver as to him of the two-year foreign residence requirement applicable to exchange visitors admitted for study and training. Defendant (the Secretary of Defense) moved the court to dismiss the action for lack of jurisdiction and for failure to state a claim on which relief can be granted, on the grounds that the matter was committed to his unreviewable discretion and plaintiff was without

standing to sue. Alternatively, defendant moved that summary judgment be granted in his favor on the ground that there was no abuse of discretion in this case. On January 9, 1968, the district court denied both motions but certified that the order involved a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal might materially advance the ultimate termination of the litigation. Thereafter defendant filed a timely application for permission to take an interlocutory appeal from the district court's order under 28 U.S.C. 1292(b). After an answer and a reply, this Court, on February 20, 1968, granted the application for an interlocutory appeal (J.A. 97).[1]

STATUTE INVOLVED

8 U.S.C. 1182(e), enacted in 1961, provides:

> No person admitted under section 1101(a)(15)(J) of this title or acquiring such status after admission shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa, under section 1101(a)(15)(H) of this title until it is established that such person has resided and been physically present in the country of his nationality or his last residence, or in another foreign country for an aggregate of at least two years following departure from the United States: *Provided*, That such residence in another foreign country shall be considered to have satisfied the requirements of this subsection if the Secretary of State determines that is has served the purpose and the intent of the Mutual Educational and Cultural Exchange Act of 1961: *Provided further*, That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after

[1] "J.A." refers to the Joint Appendix.

he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: *And provided further*, That the provisions of this subchapter shall apply also to those persons who acquired exchange visitor status under the United States Information and Education Exchange Act of 1948, as amended.

STATEMENT OF THE CASE

A. *The facts with respect to the denial of a waiver request for plaintiff.*

The pertinent facts are not in dispute. Plaintiff, who is thirty-six years old, is a native and citizen of South Vietnam. From 1957 to 1960 he was employed by the government of South Vietnam as a language teacher. In 1960 he applied and was selected to be a participant in an exchange program sponsored by the International Cooperation Administration (now the Agency for International Development—AID) for the expansion and improvement of secondary English education in Vietnam. The program contemplated that plaintiff and two others would come to the United States to study. Upon their return they would "teach English in secondary schools or teacher training institutions." The South Vietnamese Department of National Education "agreed to employ the participants, upon their return, in their current positions or higher ones", and the participants signed contracts to serve with the Department of National Education for ten years (J.A. 44-48).

Plaintiff entered this country in September 1960 and commenced to study at Teachers' College, Columbia University, under the sponsorship of AID. In 1963 Columbia dropped plaintiff as a student for unsatisfactory per-

formance. As a result, AID and the Vietnamese Embassy sought to get plaintiff to return to Vietnam. In March 1963, plaintiff married an American citizen. Soon afterwards he asked for permission to remain in the United States until the birth of his expected child. AID and the Vietnamese Embassy consented to this request (J.A. 60). Thereafter plaintiff obtained employment as an instructor with the Department of State Foreign Service Institute. He worked there from April 1963 to June 1964, during which time his child was born. The Institute found plaintiff difficult to supervise and irregular of attendance, and it informed him of its intention to terminate him at the end of June 1964. Plaintiff thereupon resigned (J.A. 70). Thereafter he held various temporary positions until the end of 1965.[2]

Plaintiff was given a voluntary departure date of December 26, 1965, by the INS. On January 18, 1966, without disclosing the voluntary departure date or that he had a visa problem, plaintiff obtained an appointment with the Department of the Army in the Defense Language Institute (DLI).[3] One week later, Dr. Chen, Chairman of the Far East Division of DLI, wrote a memorandum to Captain Alford of the Institute praising plaintiff's capabilities as an instructor, citing the Institute's "desperate" need of Vietnamese instructors, and urging that plaintiff be invited to remain in the United States

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[2] In November 1963, plaintiff filed an application with the Immigration and Nationalization Service (INS) for waiver of the two year foreign residence requirement of 8 U.S.C. 1182(e), on grounds that his departure from the United States would impose exceptional hardship on his American citizen wife. On August 16, 1965, INS informed plaintiff by letter of its denial of his application. The letter pointed out that plaintiff's wife had left him eight months earlier and was no longer dependent on him but that, in any event, plaintiff had shown only ordinary and not exceptional hardship (J.A. 53-54).

[3] On the following day, INS informed the Defense Language Institute that plaintiff lacked an employable immigrant status. The Institute, under regular procedures, should have checked with the Office of the Director of Defense Research and Engineering before hiring plaintiff.

(J.A. 28-29). On February 8, 1966, the Commandant of DLI informed the Office of the Director of Defense Research and Engineering (ODDR&E), which handles requests for waiver for exchange visitors, that it would like to pursue the matter of obtaining a waiver for plaintiff (J.A. 55). ODDR&E ascertained, in addition to the foregoing facts, that AID opposed a waiver because plaintiff was critically needed in the schools of Vietnam and that the South Vietnamese Embassy opposed a waiver because of plaintiff's unfulfilled military service obligation. See J.A. 61, 65. On February 14, 1966, ODDR&E advised DLI that there was no basis for a waiver. DLI agreed and withdrew its request for a waiver (J.A. 66).

On March 9, 1966, plaintiff's attorney, Mr. Carliner, wrote to the Secretary of Defense urging reversal of the Department's decision not to request a waiver. The letter stated in part (J.A. 39-40):

> I have been informed that the Department of Defense has been guided in its decision by the position taken by the International Training Division of the Agency for International Development and of the Vietnamese Embassy. The Agency for International Development, which financed Mr. Le Khac's study at Columbia University, believes that he should return to Vietnam to teach Vietnamese. The Viet Namese Embassy opposes Mr. Le Khac's continued presence in the United States for its own political reasons.
>
> Neither of these reasons seem relevant to a decision which must be made by the Secretary of Defense to determine whether Mr. Le Khac's services are necessary in the public interest of the United States. * * *
>
> It may assist you in rendering your decision to know that in no event does Mr. Le Khac plan to return to Viet Nam at the present time. Prior to his departure for the United States, he had been banished by the Vietnamese authorities to an isolated area because of public criticism of the government. If he is required to leave the United States he will take up residence in a third country * * *.

On March 18, 1966, Lt. General William Ely, Deputy Director, Administration and Management, ODDR&E, replied to Mr. Carliner in part as follows (J.A. 42-43):

> I believe you are familiar with Defense policy and procedure on waiver requests and received a copy of the enclosed policy statement prior to review of a waiver application you submitted to our office in 1965. When you discussed Mr. Le Khac's situation with Mrs. Astrid Kraus on March 2, 1966, you were informed that DLI in early February had requested our assistance in securing a waiver for Mr. Le Khac and that our review resulted in a determination that a valid waiver request could not be made to the Department of State in this case. In view of the urgent need for Viet Namese instructors, this decision was reluctantly reached after a careful assessment of all relevant factors.
>
> An important factor in this decision was Mr. Le Khac's status as a participant in an official exchange visitor program of the U.S. Government. Both Defense policy and an Interagency Agreement (Foreign Affairs Manual Circular No. 292), to which Defense is a signatory, require the concurrence of the sponsoring Federal agency to a waiver request by another interested Federal agency. As an AID grantee selected by his own government for U.S. training, Mr. Le Khac has a special obligation to honor his return-home commitment. Since his AID support was terminated, in April 1963, AID and the Embassy of Viet Nam sought to secure his return to Viet Nam after the birth of his child and an adverse decision on his own exceptional hardship waiver application.
>
> Both in our original waiver review requested by the Defense Language Institute and in the current re-assessment of the merits of a waiver in response to your letter, we find that AID, the Department of State, and the Viet Namese Government stand firmly opposed to a waiver on program, policy and foreign relations grounds. If Viet Nam needs Mr. Le Khac's services in a military or civilian capacity in support

of Joint US-Viet Nam objectives in Viet Nam, in our judgment this requirement must take precedence over Department of Defense needs for his language instruction services here. In another AID grantee case considered recently both AID and the Viet Namese Embassy gave written concurrence to our waiver request to help enable the Defense Language Institute to meet its urgent Viet Namese Language requirements in a prime program area.

You report that Mr. Le Khac would take up residence in a third country rather than return to Viet Nam at the present time. Unless there is a genuinely valid basis for such decision on Mr. Le Khac's part, this would, in view of the U.S. commitments in Viet Nam, reinforce rather than alter the judgment that a waiver would not be in the U.S. National interest. Your reference to Mr. Le Khac's banishment by the Viet Namese authorities to an isolated area because of public criticism of the government in power prior to his U.S. admission in 1960 introduces a factor that has not, to our judgment, been previously raised. You may wish to bring any relevant information you have on this matter to the attention of the Desk Officers in AID and the Department of State who would be competent to evaluate the facts and the effect of such a situation on AID's present position with respect to a waiver. Under our working relationship with AID and State, we are notified of any change in their position in a case of interest to the Department of Defense.

Deportation proceedings were commenced against plaintiff in March 1966 because of his overstaying of his voluntary departure date of December 26, 1965. In August 1966, plaintiff filed a motion with the INS, pursuant to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), to withhold deportation to Vietnam on the ground that he will be subject to persecution if deported to that country. Both the motion and the deportation proceedings are pending. Meanwhile plainiff continues to work for DLI.

B. *Legislative and regulatory background of the exchange visitor program and the provision for waiver of the two-year foreign residence requirement.*

1. *The legislative background*

The exchange visitor program was established by Congress in 1948 with the passage of the United States Information and Educational Exchange Act, 62 Stat. 6. The purpose of the Act was to "promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries" by means of (1) "an information service to disseminate abroad information about the United States, its people and [foreign] policies" and (2) "an educational service to cooperate with other nations in—(a) the interchange of persons, knowledge, and skills; (b) the rendering of technical and other services; [and] (c) the interchange of developments in the field of education, the arts, and sciences." 62 Stat. 6. Section 201 of the Act provided that exchange visitors who did not maintain their status or who overstayed the period of their temporary admission would be "promptly deported" and would not be eligible for suspension of deportation. 62 Stat. 7. The program did not function as contemplated. Many exchange visitors succeeded in evading their obligation to use their knowledge and acquired skills abroad, by leaving the United States and being readmitted as immigrants from neighboring countries such as Canada, or by means of special relief bills authorizing them to remain in the United States and changing their status. See H. Rep. No. 2110 and S. Rep. 1608, 84th Cong., 2d Sess. Both the President and the Congress considered that these efforts tended to undermine the basic objectives of the program.[4] As a result, amendments were adopted in 1956

[4] Both the House and Senate Reports cited above refer to the language of President Eisenhower in vetoing a private bill to grant an exchange visitor permanent residence, to wit:

> "All of the exchange programs are founded upon good faith * * *. On the one hand exchange aliens must return to the

to make clear that the "exchange program is not an immigration program and should not be used to circumvent the operation of the immigration laws." S. Rep. 1608, 84th Cong. 2d Sess., p. 3. The amendments, 70 Stat. 241, contained the substance of the present 8 U.S.C. 1182(e), set forth *infra*, pp. 2-3. They establish the two-year foreign residence requirement for exchange visitors with a provision for waiver by the Attorney General upon the request of an interested government agency and the recommendation of the Secretary of State.[5] Senator Fulbright indicated, 102 Cong. Rec. 5019, that the waiver provision was designed to deal with:

> individual cases in which the exceptional talents of the exchange visitor are so greatly needed by our Government as to warrant treatment other than that indicated in ordinary cases.

The two-year residence requirement and waiver provision were carried forward in 1961 when the statute in its present form was enacted. The 1961 statute, section 109(d) of the Mutual Cultural Educational Exchange

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country from which they come. On the other hand, the United States must not permit either immediate re-entry or other evasion of the return rule. Otherwise the countries from which our exchange visitors come will realize little or no benefit from the training or experience received in the United States, and we shall fail to promote good will toward and better understanding of our way of life."

[5] The text of the amendment provided in pertinent part:

> No person admitted as an exchange visitor under this section or acquiring exchange visitor status after admission shall be eligible to apply for an immigrant visa, or for a nonimmigrant visa under section 101(a)(15)(H) of the Immigration and Nationality Act, or for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States: *Provided*, That upon the request of an interested Government agency and the Secretary of State, the Attorney General may waive such two-year period of residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest * * *.

Act of 1961, set forth *infra*, pp. 2-3, contained amendments both ameliorating and tightening the provisions bearing upon the ability of an exchange visitor to achieve permanent residence status. The amelioration, not here pertinent, was in the form of a provision empowering the Attorney General to waive the two-year foreign residence requirement upon a finding by the Commissioner of Immigration and Naturalization that "departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States . . .)."[6] The restriction placed in the statute provided that an alien exchange visitor who had spent more than two years in foreign countries following his departure from the United States would nevertheless not be entitled to seek permanent residence in this country unless the Secretary of State considered that the foreign residence of the alien "served the purpose and the intent of the Mutual Cultural and Educational Exchange Act of 1961." 8 U.S.C. 1182(e). A House Committee Report, H. Rep. 1094, 87th Cong., 1st Sess., explained the reason for this addition as follows (*id.* at p. 16):

> The purpose of this modification of the existing requirement is to avoid situations where an exchange alien trained in the United States prefers to spend the requisite 2 years in a country well supplied with the skills which he acquired in the United States to the obvious detriment of his own country or other areas where his skills could be better utilized. A case in point is the considerable number of students . . . who select Canada as the country in which they spend the 2 years rather than return home or go to some less-developed country.

The House Report relating to the 1961 statute also included information concerning the way in which the waiver provision was being administered. Thus, Congress

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[6] It was this provision which plaintiff had previously unsuccessfully invoked. See *infra*, p. 4, n. 2.

was aware that interested agencies were dealing severely with waiver applications and that the Department of Health, Education and Welfare, which handles more such applications than any other agency, had granted only about seventy of five thousand waiver applications considered between 1956 and 1961. H. Rep. No. 721, 87th Cong., 1st Sess., pp. 32, 41. Congress was further advised that the Department of State considered HEW's administration of the waiver provision "excellent and professional" (*id.* at p. 32). Congress reenacted the two-year foreign residence requirement and provision for waiver with no substantial changes from the 1956 act other than the hardship provision referred to. The Senate Report (S. Rep. No. 372, 87th Cong., 1st Sess., pp. 19-20) stated:

> This section continues the special provision authorizing the Attorney General to waive the 2-year provision in the case of any alien whose admission to the United States is found to be in the public interest. The waiver is subject to a request by an interested agency of the Federal Government and recommendation by the Secretary of State to the Attorney General.
>
> The purpose of section 109(d), of course, is to continue to make certain that visitors who had received assistance under the Government exchange program will return home and utilize to the benefit of their countries—and, implicitly, of the United States—the knowledge or skill that they acquired here. In this connection, foreign governments (especially those of underdeveloped countries) are unlikely to cooperate enthusiastically in the exchange program if some of their most useful citizens choose to remain permanently in this country, and are encouraged to do so.

See also, to similar effect, H. Rep. No. 1197, 87th Cong., 1st Sess., p. 17.

2. The pertinent regulations and policies.

The Department of State has adopted general regulations governing waiver requests by interested agencies on behalf of exchange visitor aliens. In pertinent part, these regulations provide (22 C.F.R. 63.6(d) and (e), 63.7):

> A request for a waiver submitted by an agency of the United States Government to the Secretary for his recommendation shall recite the facts concerning the admission and places and periods of stay in the United States of the exchange visitor and the country of his nationality or last residence; identify his sponsor or sponsors by name and program number; name the place of his intended residence in the United States and state the reason or reasons why the waiver is being requested; and be accompanied by the report of the sponsor or sponsors of his application.[7]
>
> . . . The request must be supported by documentary evidence demonstrating that issuance of the waiver is in the public interest because the two-year period of residence abroad would . . . be clearly detrimental to a program or activity of official interest to an agency of the Government of the United States.
>
> * * *
>
> Upon receipt of a request from an interested United States Government agency . . . that the foreign residence requirement of section 212(e) of the Immigration and Nationality Act, as amended, be waived in the case of an exchange visitor, the Secretary shall review the policy, program, and foreign relations aspects of the case and in appropriate instances shall transmit his recommendation to the Attorney General for the latter's finding and consequent action.

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[7] A sponsor is defined as "any existing reputable United States agency or organization or recognized international agency or organization having United States membership and offices which makes application as hereinafter prescribed to the Secretary of State for designation of a program under its sponsorship as an 'Exchange Visitor Program'". 22 C.F.R. 63.1(b).

Various agencies of the United States government have adopted standards for evaluating waiver requests on behalf of exchange visitor aliens. See, *e.g.*, regulations of the Department of Health, Education, and Welfare at 45 C.F.R. 50.1-50.5 (promulgated in 1961). In 1965 the Department of Defense became a party to an "Interagency Policy on The Return Of Participants In Exchange Visitor Programs" (J.A. 80-86), proposed by the Department of State to "guard against any possible future use of Exchange Visitor Programs as channels for immigration" (J.A. 78).[8] The criteria established, insofar as here pertinent, are as follows:

1. (a) *Importance of the Program or Activity Involved*

   The services of the individual must be needed in a highly important program or activity of national or international significance in the areas of interest of the department or agency concerned. * * *

   (b) *Essential Relationship of the Individual to the Program*

   A direct relationship must exist between the individual and the program or activity involved, so that loss of his services would necessitate discontinuance of the program, or of a major phase of it. * * *

   (c) *Critical Qualifications of the Individual*

   The individual must possess unusual and outstanding qualifications, training, and experience, including a clearly demonstrated capability to make original and significant contributions to the program.

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[8] The signatory agencies were the Departments of State and Defense, AID, The Department of Health, Education, and Welfare, the Peace Corps, and the U.S. Information Agency.

2. *Other Considerations*

(a) *Clearance of Application When U.S. Government Agency Officially Sponsors (i.e., Finances) the Exchange Visitor.*

In the case of an Exchange Visitor who came to the United States on an official Exchange Visitor Program of the U.S. Government, the application should include evidence that the sponsoring Federal agency has agreed to the application being made, or, if it did not agree, the grounds on which it declined to do so.

(b) *Additional Relevant Factors*

In addition to the criteria listed above, account may also be taken of other factors which are relevant to the interest of the particular U.S. Government agency which is considering the waiver application.

A prior (1963) Defense Department statement of policy and procedure on waiver requests, establishing ODDR&E as the unit within the Department responsible for handling such request, and containing substantially identical standards, is set forth at J.A. 32-35. Among the criteria listed in this policy statement, under the heading "Relevance of other factors", are the "exchange visitor's . . . commitment to return home [and] the attitude of his government" (J.A. 35).

SUMMARY OF ARGUMENT

The Defense Department's decision not to request a waiver of the two-year foreign residence requirement for plaintiff is "committed to agency discretion" under Section 10 of the Administrative Procedure Act and is not reviewable. The Supreme Court has recognized that Congress' purpose in enacting this provision was to insulate from court scrutiny a certain narrow category of agency actions which Congress deems best left to unreviewable agency determination. The statutory provision permit-

ting a waiver request to be made by an "interested agency" on behalf of an exchange visitor is in that category. It was designed to benefit the United States, not the exchange visitor, by creating a means whereby this country can retain the services of exceptionally talented exchange visitors working in programs of national significance. An exchange visitor is therefore without standing to challenge an unfavorable agency decision with regard to a waiver. Moreover, the determination whether it is in the "public interest" of the United States that a particular exchange visitor be encouraged to remain here —the standard which the statute lays down—is one which courts are equipped neither to make nor to review. The decision whether to request that an exchange visitor remain in the United States clearly involves delicate judgments of foreign policy (particularly where the exchange visitor's home country desires his return) which courts have recognized are traditionally the exclusive province of the executive branch. Only agencies and not courts are able to make the critical factual assessments as to how urgently an exchange visitor is needed in this country and the extent of the possible detriment to our foreign relations in the event a waiver of the two-year residence requirement is granted. Consequently, the district court should have granted the motion of the Secretary of Defense to dismiss plaintiff's complaint on grounds that the court was without jurisdiction over the subject matter and that the complaint failed to state a cause of action.

If, contrary to our previous contention, this Court holds the determination by defendant to be in some degree reviewable, then defendant was entitled in any event to summary judgment. The scope of review should be no wider than the typical one afforded for review of discretionary agency determinations as to aliens—*i.e.*, whether the agencies applied appropriate standards in reaching their conclusions. Although plaintiff contends that the standards applied by the Defense Department were arbitrary, it is clear that they were consistent with the statutory purposes. The Department of Defense based its re-

fusal to request a waiver as to plaintiff on the lack of approval of AID, plaintiff's sponsoring agency, and on the desire of the South Vietnamese government that plaintiff be returned there to fulfill his military and other commitments to that nation. In view of the purpose of the exchange visitor program to improve our foreign relations with other countries by training certain of their citizens to perform useful skills there, it was clearly pertinent to rely upon AID's assessment that plaintiff's services as an English instructor were urgently required in South Vietnam. The Defense Department regulation making the approval of an exchange visitor's sponsoring agency an important factor in considering a request for a waiver is reasonable because the sponsoring agency, which has primary responsibility for administering the exchange visitor program, is likely to possess insight into the particular needs of the foreign country for an exchange visitor whom it has sponsored, which would be unavailable to the "interested agency" which must make the determination whether to seek a waiver. In light of the purposes of the program, it was plainly pertinent too to give weight to the desire of plaintiff's home country, which had selected him for participation in the program, that he be returned to fulfill his military and civilian commitments to that nation.

The case is not altered by plaintiff's present claim that he would be subject to persecution in South Vietnam for his political opinions under a decree passed in 1965. That claim of possible persecution was not before the Defense Department when it made its decision not to request a waiver. While there exists a possibility that AID and the Defense Department might wish to reconsider the waiver application in the event plaintiff's assertions as to persecution in Vietnam prove valid, that speculative contingency does not affect the ripeness of the controversy upon which plaintiff has sought review—*i.e.*, whether it was reasonable for defendant to decline to request a waiver because of the disapproving attitudes both of AID and South Vietnam. The merits of plaintiff's perse-

cution contention are presently being litigated in the deportation proceeding pending before the Immigration and Naturalization Service. They have no place in this action.

Contrary to plaintiff's assertion below, no defect in the record renders summary judgment inappropriate. Although the pleadings disclose one fact in dispute between the parties, the fact is not material. Moreover, the record here affords an ample basis for review. Not only does it contain the letter setting forth the reasons for defendant's decision, but also various documents showing the Defense Department's fact-finding and decision-making process in the present case. To require more would place an undue strain upon the procedures followed by most agencies in administering the waiver provision of 8 U.S.C. 1182(e). These procedures, while fair and thorough, are necessarily informal, since they involve the obtaining of information by telephonic and other means from sources both inside and outside of government.

ARGUMENT

I. The Determination by the Department of Defense Not to Request a Waiver of the Two-Year Foreign Residence Requirement for Plaintiff Is Not Reviewable.

A decision that waiver of the two-year foreign residence requirement of 8 U.S.C. 1182(e) is not in the public interest is a matter committed to agency discretion which is not judicially reviewable.

Plaintiff invoked the district court's jurisdiction under Section 10 of the Administrative Procedure Act of 1946, 5 U.S.C. 1009. That section provided:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . . (a) any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to review thereof.

This provision was reenacted in different form but without substantive change, in 1966 as part of a reorganization of Title 5 (5 U.S.C. 701(a), 702), as follows:

> 701(a): This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.
>
> 702: A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to review thereof.

It is our position that the decision of the Defense Department as to whether a waiver of the two year residence requirement at 8 U.S.C. 1182(e) is "in the public interest" is peculiarly a matter "committed to agency discretion" which the district court has no jurisdiction to review.[9]

The clear effect and intent of the language "agency action . . . committed to agency discretion", is to insulate from judicial review a category of administrative actions which Congress deems best left to unreviewable agency determination. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); Davis, *4 Administrative Law Treatise* § 28.16. The Supreme Court has recognized that there is a type of administrative action which was not intended to be and is not a proper subject for review by the courts. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958) (power of Canal Company to determine

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[9] In point II we show that there is in any event no merit in plaintiff's claim that the Defense Department's refusal to request a waiver was arbitrary because based on factors allegedly irrelevant—*i.e.*, the failure of plaintiff's sponsoring agency, AID, and his home country to approve the waiver and to urge instead his return to South Vietnam to fulfill his educational and/or military commitments to that nation.

when to change toll rates) and *Schilling* v. *Rogers*, 363 U.S. 666 (administrative determination that petitioner was not eligible for return of property under the Trading with Enemy Act). See also *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963). This Court, too, has recognized that the Administrative Procedure Act precludes judicial review of agency action committed by law to agency discretion, *American Air Export & Import Co.* v. *O'Neill*, 95 U.S. App. D.C. 274, 221 F.2d 829, 830 (1954). On several recent occasions it has held itself without the power to review administrative determinations even for alleged abuse of discretion. *E.g.*, *Koptik* v. *Chappell*, 116 U.S. App. D.C. 122, 321 F.2d 388 (1963) (decision of parole board to reconsider granting a defendant's parole); *Newman* v. *United States*, —— U.S. App. D.C. ——, 382 F.2d 479 (1967) (decision of prosecutor whether to accept a plea to a lesser offense).[10] Other circuits concur. *E.g.*, *Ferry* v. *Udall*, 336 F.2d 706 (9th Cir. 1964), certiorari denied, 381 U.S. 904 (1965); *United States* v. *One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964); *Montgomery* v. *French*, 299 F.2d 730 (8th Cir. 1962) (holding that a statute providing that, to grant a petition for classification of an alien as

[10] Plaintiff below relied upon the footnote-dictum in *Overseas Media Corp.* v. *McNamara*, —— U.S. App. D.C. ——, 385 F.2d 308, 316-317 ft. 14 (1967), that the "Legislative History of the Administrative Procedure Act belies" the position that the "act of committing a matter to an agency's discretion forecloses court consideration of an alleged abuse of that discretion." In view of the legislative dialogue thereafter quoted by the court, it may well be that what was meant was merely the unimpeachable proposition that the fact that action is initially delegated to an agency's discretion will not foreclose the courts from review of the exercise of that discretion for an abuse. In view of the decisions of the Supreme Court and of this Court cited in the text, we do not believe that the Court's statement was intended to imply that the special type of action which is "committed to agency discretion by law" under 5 U.S.C. 701(a) is yet reviewable for alleged abuse of discretion. The legislative history of the Administrative Procedure Act, while unclear, on balance supports the literal construction given to it by the court decisions cited previously. Compare Sen. Doc. No. 248, 79th Cong. 2d Sess. pp. 310-311 with pages 229 and 413 of the same document. And see Davis, *4 Administrative Law Treatise* 1965 Supp. p. 18.

an "eligible orphan", the Attorney General must be satisfied that the persons seeking to bring the alien into the United States "will care for such eligible orphan properly if he is admitted", and affording no remedy of review, was intended to vest in the Attorney General sole discretion with regard to the indicated determination).

In its ruling in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-318 (1958), the Supreme Court found that the matter was committed to unreviewable agency discretion because the decision involved:

> Nice issues of judgment and choice, . . . which require the exercise of informed discretion. * * * The case is . . . quite unlike the situation where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed action.

The type of determination here involved,—whether it is in the public interest of the United States to request an exception to a specifically defined policy with respect to aliens admitted for a special purpose—is, on its face, the type of issue committed to unreviewable agency discretion. It is not action on behalf of any person, but on behalf of the "public interest" and involves nice issues of judgment and choice in relation not only to United States concerns, but to foreign affairs. This is not the kind of issue with which courts are equipped to deal.

In view of the legislative history of 8 U.S.C. 1182(e) and the exchange visitor program set forth earlier, no extended argument is necessary to show that the provision permitting waivers of the two-year foreign residence requirement to be granted in the public interest, on request of an interested government agency and the Secretary of State, was not enacted for the benefit of the exchange visitor. The clear purpose was to enable interested government agencies, and thus the United States, to retain certain exceptionally talented and indispensable personnel who were admitted to this country under an exchange visitor program despite the general Congressional policy against retention of such aliens. The advantage

derived by an exchange visitor whom an interested agency desires to keep is merely incidental to the broader purpose served.

One way of viewing the jurisdictional problem in this context is in terms of the standing of the incidental beneficiary of agency action to challenge it. The Administrative Procedure Act, on which plaintiff predicates jurisdiction, affords relief only to those who suffer "legal wrong" because of agency action. 5 U.S.C. 702. When no legal rights of a person are shown to be invaded or threatened by government action, the person has no standing to sue. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125, 127; see *Texas State AFL-CIO* v. *Kennedy*, 117 U.S. App. D.C. 343, 330 F.2d 217, certiorari denied, 379 U.S. 826 (1964); *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 225 F.2d 924, certiorari denied, 350 U.S. 884 (1955). Here, although plaintiff would be favorably affected by a waiver request on his behalf by the Department of Defense, the statute was not designed to accord him the right to demand that such a request be made. The case is thus comparable to *United States* v. *Cummins*, 265 F.2d 763 (9th Cir. 1959), where the Ninth Circuit held that an internal revenue agent had no standing to challenge the refusal of the Secretary of the Treasury to recommend him for retirement under increased benefits, (even though error of law was alleged in the refusal to recommend), because the purpose of the legislation empowering the Secretary to so recommend was not to reward the particular recipient, but to provide an incentive for early retirement so that younger men could perform in certain dangerous law enforcement jobs.

This aspect of the case is pointed up by comparison with the deportation cases. Review of an order of deportation is proper—and possibly even constitutionally necessary—because the order directly affects the person of the alien and is a restriction upon his liberty. See Jaffe, *Judicial Control of Administrative Action*, pp. 381-389 (1965). Even the granting of discretionary relief, such as suspension of deportation because of hardship or dan-

ger of persecution, has been held judicially reviewable for arbitrariness or error of law in the applicable standards. In the very statute at issue here, the courts have held that the hardship waiver provision inserted into the statute in 1961 for the benefit of the exchange visitor (see *ante*, p. 10) was intended to afford judicial review for abuse of discretion. See *Talavera* v. *Pederson*, 334 F.2d 52 (6th Cir. 1964); *Mendez* v. *Major*, 340 F.2d 128 (8th Cir. 1965). The crucial distinction is that the waiver on hardship grounds was intended for the benefit of the alien. The "public interest" waiver was enacted for the benefit of the United States, not the alien, and was intended to confer upon the alien no privilege or right.[11]

Moreover, aside from the question of benefit, the determination here involved is not the type of issue which lends itself to judicial review. The statute here is couched in permissive, not mandatory, language. Compare *Ferry* v. *Udall*, 336 F.2d 706, 712 (9th Cir. 1964), certiorari denied, 381 U.S. 904 (1965). With respect to non-hardship waivers of the type sought by plaintiff, the only standard provided is the "loose" one (*Panama Canal Co.* v. *Grace Line, Inc.*, *supra*, at 318) of the "public interest". 8 U.S.C. 1182(e). The determination of whether an exchange alien, brought here under a program designed to develop skills useful in other participating countries, has become so valuable to the United States

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[11] The failure to distinguish between the two aspects of the statute accounts, we believe, for conflicting decisions of the Seventh Circuit on the issue. When direct review was sought of action of the Department of Health, Education and Welfare declining to request a waiver, that circuit held the issue was not reviewable as committed to exclusive agency discretion. *Martin* v. *Gardner*, 378 F.2d 352 (7th Cir. 1967). In the companion cases *Velasco and Morales* v. *Immigration and Naturalization Service*, 386 F.2d 283 (7th Cir. 1967) and *Glorioso and Colinco* v. *Immigration and Naturalization Service*, 386 F.2d 664 (7th Cir. 1967), the challenge was made in the course of a proceeding to review the denial of a stay of deportation. The court, without adverting to the *Martin* decision, undertook to review the determination for an abuse of discretion, finding that none had occurred.

that he ought to be allowed to remain here, sometimes without the approval of his home country, involves the exercise of delicate foreign policy judgments of a sort traditionally the exclusive province of the executive branch. Courts are simply not equipped either to make, or to review, a determination whether in light of the objectives of the exchange visitor program, a particular exchange visitor is so important to the United States that he should be permitted to remain without having spent the normal two-year period of residence abroad. In *Cobb* v. *Murrell*, 386 F.2d 947 (5th Cir. 1967), the court concluded that a statute empowering the Secretary of Labor to exclude any alien whose employment would, *inter alia*, "adversely affect the wages and working conditions of the workers in the United States similarly employed" was designed to commit that finding to the exclusive discretion of the Secretary. The determination here is even more clearly one which involves the kind of judgment which a Court cannot review.

There is an additional, practical consideration underlining the importance of a clear resolution by this Court of the jurisdictional question. The Department of State advises that there are approximately 75,000 exchange visitors presently in the United States. The annual rate of admission of such visitors for the last three years has averaged about 35,000. The number of applicants for waivers of the two-year foreign residence requirement has thus far remained relatively small. The Department of Health, Education and Welfare, which handles more such applications than any other agency, disposed of 400 applications in the year ending November 1967. However, if waiver refusals are reviewable, it is a fair prediction that many more applications will be filed, with subsequent efforts at judicial review. Such an opportunity for lengthy consideration of their cases would induce aliens whose applications are without merit to make applications as a delaying tactic. As a result, the statutory provision, which was designed solely as a benefit in highly exceptional circumstances to the United States,

could turn into a means for frustrating the operation of the exchange visitor program by postponing the date of return of exchange visitors to their home countries.

II. Assuming, Arguendo, the Reviewability of Defendant's Denial of Plaintiff's Waiver Application, Summary Judgment in Defendant's Favor Should Have Been Granted.

If, despite our contention, this Court should hold that refusals to request waivers of the two-year foreign residence requirement are, to some degree, reviewable, it is clear that the scope of review is a narrow one, limited to questions of law such as whether the standards employed by the agency in making its determination accord with the statutory intent. The typical extent of review, even as to discretionary remedies enacted *for the benefit of an alien*, in contrast to that here, is no greater. See *e.g.*, *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (suspension of deportation); *Sovich* v. *Esperdy*, 319 F. 2d 21 (2nd Cir. 1963) (motion to withhold deportation on grounds of persecution); Gordon and Rosenfield, *Immigration Law and Procedure*, §§ 8.14, 8.15 (1965). Such a scope of review would insure that no waivers were denied because of application of erroneous principles, while leaving factual assessments (*e.g.*, whether a particular exchange visitor is urgently needed in his home country) solely in the hands of the agencies which are competent to make them. Viewed in context of this review standard, the complaint in this case fails to state a cause of action, and defendant is entitled to summary judgment.

The factors employed by the Department of Defense in refusing to request a waiver of the two-year foreign residence requirement as to plaintiff were reasonable and clearly pertinent to the purposes underlying the exchange visitor program. As appears from the letter of Lt. General Ely, *ante*, pp. 6-7, the determination not to request a waiver was predicated upon the facts (1) that AID, plaintiff's sponsor, was opposed to a waiver because of its belief that plaintiff was needed urgently in South Vietnam as an English instructor and (2) that the government of

South Vietnam desired plaintiff's return to that country to fulfill his military and other commitments there. Since the aim of the two-year residence requirement is to insure, in most cases, that exchange visitors will not utilize their training in the United States as an avenue of immigration but will return to their own country or to one less well developed than the United States to employ their skills, it was clearly proper to take account of the fact that plaintiff was urgently needed in his home country in either a military or civilian capacity. Particularly is this true, as General Ely mentioned (*ante*, p. 7), in view of the present United States objectives and commitment in South Vietnam. Moreover the circumstance that AID, as plaintiff's sponsor, opposed plaintiff's waiver application had independent significance. It was reasonable for the Defense Department to determine that it would give weight to the views of plaintiff's sponsoring agency whether a waiver should be granted, irrespective of the Defense Department's knowledge of the particular facts involved. The principal purpose of the legislation which Defense, as an "interested agency", is being called upon to administer, is to aid the proper functioning of the exchange visitor program. Agencies such as AID, which have the primary responsibility for financing and approving various exchange visitor applications, necessarily acquire considerable insight into the needs of the home country when they undertake to sponsor an exchange visitor in the first instance. The Defense Department could reasonably conclude that the sponsoring agency was in the best position to determine whether the need for plaintiff's services was still so great that there should be no waiver of the residence requirement, bearing in mind that the primary purpose of the program is to aid other countries in developing skills.

Plaintiff contended below (J.A. 3-4) that the Department of Defense had abdicated its duty to exercise independent discretion by promulgating a written policy (J.A. 32-35), and entering into an interagency agreement (J.A. 80-86), whereby the approval of an exchange visi-

tor's sponsoring agency was made a prerequisite to favorable Defense Department action on the applicant's request for a waiver recommendation. As a purely factual matter, the assertion that the sponsor's approval is a prerequisite is open to question. The 1963 statement of policy did make such approval necessary, but the 1965 interagency agreement provides that the "application should include evidence that the sponsoring Federal agency has agreed to the application being made, *or, if it did not agree, the grounds on which it declined to do so*" (J.A. 84) (emphasis supplied). This would seem to indicate that the disapproval of the sponsoring agency is a serious adverse factor, but not an absolute barrier, to favorable consideration of a waiver application. While the letter of Lt. General Ely to plaintiff's counsel does state that both "Defense policy and an Interagency Agreement . . . require the concurrence of the sponsoring Federal agency to a waiver request" (J.A. 42), the letter also states that the application was denied only after "careful assessment of all relevant factors", including the South Vietnamese government's desire that plaintiff be returned to Vietnam, and plaintiff's "special obligation to honor his return home commitment". *Ibid.*

Even if the interagency agreement did make approval of the waiver a prerequisite, this would not render the policy invalid. It is well settled that an administrative body may act by general rule, and that to do so does not constitute a failure to exercise discretion. *E.g.*, *Stellas* v. *Esperdy*, 366 F.2d 266, 269-270 (2nd Cir. 1966), vacated on other grounds, 388 U.S. 462 (1967). The discretion is exercised initially in promulgating the rule. Only where the regulation itself in unreasonable has it been held that discretion has not been exercised. See *Mastrapasqua* v. *Shaughnessy*, 180 F.2d 999 (2nd Cir. 1950). Here, as indicated, the Defense Department could reasonably determine that the sponsoring agency was in the best position to weigh the waiver application in the light of the primary purpose of the legislation to aid underdeveloped countries.

Plaintiff also contended in his complaint (J.A. 4-6) that it was arbitrary for the Defense Department to consider the desire of the government of South Vietnam that he be returned to that country. This contention is clearly without merit. In light of the purpose of the exchange visitor program, *inter alia*, to benefit other nations from which exchange visitors come by training them for more skilled and useful employment upon their return to their home countries (and thus indirectly to improve relations and understanding between the United States and those countries), it was plainly relevant to take into account the wish of the South Vietnamese government, which had selected plaintiff for participation in the exchange program, that plaintiff be sent back to fulfill his commitments there.

The case is not altered by plaintiff's late interjection into the waiver preceeding of his claim that he would be subject to persecution on grounds of political opinion if returned to South Vietnam. When plaintiff's attorney Mr. Carliner wrote to the Secretary of Defense on March 9, 1966, urging reconsideration of the refusal to request a waiver, he asserted, as basis for his claim that plaintiff would be subject to persecution, that plaintiff had been banished to an isolated area of South Vietnam by that government prior to his departure for the United States (J.A. 40).[12] Lt. General Ely, in response, pointed out that the claim of banishment raised a factor not previously considered and suggested that plaintiff bring "any relevant information . . . on this matter to the attention of the Desk Officers in AID and the Department of State who would be competent to evaluate the facts and the effect of such a situation on AID's present position with respect to a waiver." J.A. 43. In the present complaint, plaintiff does not allege either that he had been or would be subject to banishement, but rather that he would be liable to prosecution for his beliefs under a South Viet-

[12] In view of the fact that plaintiff left for the United States in 1960, the alleged banishment order would have been promulgated by a regime other than the one presently in power.

namese decree promulgated in May 1965 (J.A. 4-5). It is clear that this claim of possible persecution was not before the Defense Department when it made its determination to refuse to request a waiver for plaintiff and thus is not a proper part of the instant action for review.

Normally, a claim of persecution would not even be relevant to a determination whether to request a waiver of the two-year foreign residence requirement, since most such applications are disposed of by reference to the question whether or not the exchange visitor meets the personal qualifications of skill and contribution to a program set forth in the regulations (see *infra*, p. 13). In this case, however, we recognize that a linkage exisits because of the fact that the reasons for the Defense Department's refusal to request a waiver as to plaintiff depended upon the conclusion by AID and the South Vietnamese government that plaintiff's services are urgently required in South Vietnam. Thus, in the event plaintiff's claims of persecution in South Vietnam prove valid, it may be that both AID and the Department of Defense would wish to reexamine the matter of seeking a waiver for plaintiff. But that speculative possibility does not affect defendant's right to summary judgment on the present record. Plaintiff currently in his deportation proceeding before the Immigration and Naturalization Service has moved for withholding of deportation to South Vietnam on the ground that he would be subject to political persecution there. That motion, and not the present action, is the appropriate place to litigate the merits of plaintiff's assertions with regard to possible persecution in Vietnam. The gravamen of plaintiff's complaint here is that the Defense Department acted unreasonably in relying upon determinations by AID and South Vietnam that plaintiff should be returned to South Vietnam so as to be available to fulfill his civilian and military commitments to that country. That issue is ripe for decision. It is unaffected by the fact that Defense, when first presented at a late stage with plaintiff's unsupported claim of persecution and banishment by South Vietnamese authorities, quite

reasonably told plaintiff, in effect, to pursue that question initially with the sponsoring agency and the Department of State.

Contrary to plaintiff's contentions below, there is no procedural barrier to summary judgment on this record. An examination of the pleadings (*i.e.*, plaintiff's "Statement of Material Facts As to Which There Is No Dispute", J.A. 89-93, and Defendant's "Response" thereto, J.A. 94-95), reveals that the sole issue of fact which appears to be in dispute between parties is whether the Defense Language Institute, upon learning that ODDR & E would not request a waiver as to plaintiff, withdrew its application. That fact, however, is not material, since the Defense Department did not purport to base its decision to refuse to seek a waiver even in part on any theory that no application in plaintiff's behalf was actually before it. Nor did defendant below make any such claim.

The record below is ample to show that plaintiff has no cause of action. It contains not only the letter of the Defense Department stating the grounds of decision, but also the contemporaneous record of the Department's fact-finding and decision-making process with respect to the refusal to request a waiver. To require more would place an undue strain upon the procedures adopted by most agencies in considering waiver applications under 8 U.S.C. 1182(e). These procedures, while fair and thorough, are informal. They frequently involve reliance upon advice and assistance received from expert sources both in and outside the government. More formal proceedings would be costly and time consuming and would enhance the temptation for exchange visitors to utilize the waiver request process as a means of prolonging their stay in the United States, contrary to the purpose of the statute. The statute on its face and its legislative history show that Congress intended the waiver provisions to be very sparingly exercised for the truly exceptional situation where departure of a particular alien would seriously impair the public interest. This record affirmatively shows that plaintiff is not in such category.

CONCLUSION

For the reasons stated, appellant respectfully submits that the judgment of the district court should be reversed and the complaint dismissed for lack of jurisdiction or failure to state a claim on which relief can be granted; in the alternative, the judgment of the district court should be reversed and summary judgment entered for appellant.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
NATHAN DODELL,
Assistant United States Attorneys.

Of counsel:

ROGER A. PAULEY,
Attorney,
Department of Justice.

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QUESTIONS PRESENTED

1. Whether the District Court has jurisdiction to review the exercise of discretion reposed in the Secretary of Defense by 8 U.S.C. 1182(e) for the purpose of determining whether a waiver should be sought of the requirement of two-years' foreign residence by an exchange visitor.

2. Whether a complaint which alleges that the Secretary of Defense has failed to exercise his discretion as required by statute, 8 U.S.C. 1182(e), states a cause of action.

3. Whether, where genuine issues of material fact have been raised, summary judgment is appropriate in the absence of an Answer to the Complaint, in the absence of any verified affidavits in support, and in the absence of any evidentiary hearing upon the disputed issues before the administrative agency or the District Court.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,819

SECRETARY OF DEFENSE,

Appellant,

v.

LE KHAC BONG,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF CASE

Appellee is a native and citizen of Vietnam who was admitted to the United States in 1960 as an exchange visitor (J.A. 1). On December 15, 1965, the Commandant of the Defense Language Institute, East Coast Branch, initiated a request for the employment of the appellee as an instructor in the Vietnamese language. Following referrals for clear-

ances to various agencies, including the Department of State, the Chief, Staff Civilian Personnel Division of the Office of the Chief of Staff of the Department of the Army, formally appointed the appellee as a Vietnamese language instructor on January 18, 1966 (J.A. 15-27).

On January 19, 1966, the Immigration and Naturalization Service informed the Defense Language Institute that the appellee "has 'no status' as an immigrant to the United States." On January 25, 1966, the Defense Language Institute requested the Staff Civilian Personnel Division to "take the necessary steps to retain (appellee's) services . . ." (J.A. 30). In support of its request the Defense Language Institute submitted a memorandum by the appellee's immediate supervisor, the Chairman of the Far East Division, which stated: (J.A. 28-29)

1. DLIEC is desperately in need of Vietnamese instructors, especially those who can speak South Vietnamese. We have made numerous inquiries and contacted various agencies in search of qualified Vietnamese teachers. None was available because they were in great demand. It was with extreme difficulty that we finally found Mr. Le-Khac Bong who is not only a native of South Vn, but also a highly qualified teacher.
2. Mr. Bong possesses good academic background. His education includes Baccalaureate, 1952 (South VN); post-graduate studies—law and literature, 1952-54 (University of Montpelier, France); Faculty of Letters—literature, 1955-56 (Saigon University); education and linguistics, 1960-63 (Teachers College, Columbia University). We only offer him GS7-1. With such a modest salary DLIEC can hardly hire a better educated person. Therefore, we can not afford to lose him.
3. In regard to professional qualifications, Mr. Bong's are more than adequate to meet our instructor's requirements. His past teaching and working experiences in other schools and institutions are very

valuable to DLIEC. He taught Vietnamese, English and French at Vo Tanh College, 1957-60 in South VN. At FSI he taught Vietnamese language from Apr. 1963 to June 1964. He also was a Vietnamese teacher at Sanz School of Languages. In 1964 Mr. Bong worked for the Voice of America as an announcer and translator. He also passed the examination at Joint Publications Research Service which qualified him as a translator from Vietnamese and French into English. The last mentioned exam alone proves that his command of both Vietnamese and English (besides French) is excellent. Armed with such professional capabilities, Mr. Bong is indeed a hard-to-get addition to the Vietnamese faculty of DLIEC.

4. As far as classroom performance is concerned, Mr. Bong conducts his classes in a superb manner. He is versatile, conscientious and well versed in the employment of good and modern teaching methodology. His students like his personality and deeply appreciate his teaching techniques.

5. Another very important factor is that when DLIEC moves to El Paso, we will definitely lose several Vietnamese instructors who have decided to remain in the Washington area. In fact a VN lady teacher already resigned last month on the ground that she did not want to go to Texas. Since Mr. Bong desires to move with our school to El Paso, we strongly urge that this intelligent, young and able VN instructor be invited to remain in the United States so that DLIEC can be benefitted by his invaluable services.

6. Furthermore, Mr. Bong is highly recommended by his colleagues who know him well. It is assured that his devotion to his profession and his cooperation with this school will bring greater success to the Vn-language training of our military personnel at DLIEC.

On February 8, 1966, the Commandant of the Defense Language Institute expressly informed the Assistant for

Research and Development for Manpower that the appellee "is better than others in the department," that he "can guarantee employment" for appellee and that he "would like to pursue now" the procedures for a waiver "fr [sic] AID people" (J.A. 55). Numerous telephone conversations were had with various persons regarding the waiver request (J.A. 55-72), the most critical one being one with "Herold - 182-x7291" on February 11 and recorded as follows (J.A. 62):

> "Checked: Bong Le Khac file—confirmed fieldside agreement that waiver be denied in view of AID position. (illegible) Glidden ltr to INS-W 5-25-65."

Thereafter, the memoranda of notes indicates that on February 14, 1966, Lt. General William Ely, Deputy Director for Administration and Management, "agree[d] [that there was] no basis for waiver—discuss w. Hill at DLI-EC." On the same day, Commander Robert Hill, Commandant of the Defense Language Institute, appears in the administrative file with the notation:

> "Hill agrees—Sorry apptm't was made—will discuss next steps in S/C/P- Withdrew request for any action for waiver." (J.A. 66).

On February 25, 1966, a formal response was made to the initial request of the Defense Language Institute on January 25, 1966 for a waiver on behalf of the appellee which states (J.A. 31):

> "The matter of Mr. LeKhac's retention in the United States was taken up with officials of the Office of Defense Research and Engineering, designated by the Secretary of the Army to handle such a case as that of Mr. LeKhac. Upon completion of the required negotiations on our behalf, Mrs. Kraus from the Office of Defense Research and Engineering informed Mrs. Boyer that Mr. LeKhac could not remain in the United States."

On March 9, 1966, appellee, by his counsel, requested that the Department of Defense reconsider its decision to seek no waiver recommendation from the Department of State. (J.A. 38-41). In reply, Lt. General William J. Ely stated in a letter on March 18, 1966 that the decision "was reluctantly reached after a careful assessment of all relevant factors" and set forth as the only explanation (J.A. 42-43):

> "An important factor in this decision was Mr. LeKhac's status as a participant in an official exchange visitor program of the United States Government. Both Defense policy and an Interagency Agreement (Foreign Affairs Manual Circular No. 292), to which Defense is a signatory, require concurrence of the sponsoring Federal Agency to a waiver request by another interested Federal agency. As an AID grantee selected by his own government for United States training, Mr. LeKhac has a special obligation to honor his return-home commitment. Since his AID support was terminated in April, 1963, AID and the Embassy of Viet Nam sought to secure his return to Viet Nam after the birth of his child and an adverse decision on his own exceptional hardship waiver application.
>
> "Both in our original waiver review requested by the Defense Language Institute and in the current reassessment of the merits of a waiver in response to your request, we find that AID, the Department of State and the Viet Namese Government stand firmly opposed to a waiver on program, policy and foreign relations grounds. If Viet Nam needs Mr. LeKhac's services in a military or civilian capacity in support of Joint-United States-Viet Nam objectives in Viet Nam, in our judgment this requirement must take precedence over Department of Defense needs for his language instruction services here. In another AID grantee case considered recently, both AID and the Viet Namese Embassy gave written concurrence to our waiver request to help enable the Defense Language Institute to meet its urgent Viet Namese language requirements in a prime program area."

Thereafter on August 3, 1966, appellee brought an action in the District Court to review the refusal of the Secretary of Defense to seek a waiver of the requirement that the appellee reside abroad for a period of two years. Appellee alleged that the Secretary of Defense had failed, as required by the Mutual Educational and Cultural Exchange Act of 1961, 8 U.S.C. 1182(e), "to exercise his independent discretion in determining whether to request the Secretary of State to recommend . . . [a waiver to permit appellee] . . . to be employed as an instructor in the Vietnamese language by the Defense Language Institute" but had been bound (1) by an interagency agreement with the Agency for International Development and (2) by a failure to secure concurrence to the request from the Viet Namese Government. (J.A. 1-6).

Appellee alleged that the refusal of the Agency for International Development to concur in the waiver request is based upon its determination that "training received in the United States (by exchange visitors, such as the appellee) should be utilized to help fill the critical gap in skilled manpower in the visitor's country and not to be used as a means of obtaining permanent residence and employment in the United States." Appellee also alleged that the Viet Namese Government had declined to grant its concurrence to the waiver request because the appellee is a "supporter of efforts to establish civilian controlled, democratic government in Viet Nam and to restore peace to that country," and that if returned to Viet Nam, he would be subject to punishment and imprisonment. (J.A. 3-5).

Appellee sought a judgment declaring that the Interagency Agreement binding the actions of the Secretary of Defense is in violation of the Mutual Educational and Cultural Exchange Act of 1961 and that the Secretary of Defense is required to exercise his independent discretion independently of any policies of the Agency for International Development or the Viet Namese Government. (J.A. 6).

Appellant moved to dismiss for lack of jurisdiction and for failure to state a cause of action, and alternatively for summary judgment (J.A. 7).

No answer was filed by appellant. Instead he relied upon various exhibits comprising miscellaneous letters, government forms, handwritten notes and jottings, and policy statements (J.A. 15-88). Statements of Material Facts as to Which There Is No Genuine Issue indicate that a "genuine issue" exists between the parties as to the basis of the administrative decision. Appellant listed various factors, none of which were established by affidavit or any other evidentiary manner, relating to appellee's "marital difficulties and difficulties with creditors," the "critical need" for his services in the schools of Viet Nam, and his "military service obligation," as forming the grounds for its conclusion "that there was no basis for a waiver" (J.A. 11-14, 95). Appellee alleged in his complaint and in his Statement of Material Facts that the administrative decision not to seek waiver was based upon a finding that "the AID, the Department of State and the Viet Namese Government stand firmly opposed to a waiver, on the program, policy, and foreign relations grounds" (J.A. 93).

The District Court denied both motions but permitted an interlocutory appeal to be noted (J.A. 96). This Court thereafter allowed the appeal by a split vote (J.A. 97).

SUMMARY OF ARGUMENT

The statute which governs the grant of waivers of foreign residence requirements for exchange visitors who seek permanent residence in the United States, 8 U.S.C. 1182(e), provides for a three-phased exercise of discretion in the determination of the waiver application. As relevant here, discretion is first exercised by the Secretary of Defense to determine whether the exchange visitor's departure would be "clearly detrimental" to a program of interest to the Department of Defense. Upon such a determination, dis-

cretion is then exercised by the Secretary of State whose recommendation is based upon the "policy, program, and foreign relations aspects of the case." The ultimate decision is then made by the Attorney General who under the statute must make a finding that exchange visitor's admission to the United States is "in the public interest."

Appellant has misconceived his function under the statute to encompass the discretionary role to be performed by both the Secretary of State and the Attorney General. As his Statement of Questions Presented indicates (Brief, p. 1), the issue for him is whether the District Court has "jurisdiction to review the determination of the Department of Defense *that it is not in the public interest* to request a waiver . . . ." (emphasis supplied). The statute, in terms, reserves that finding for the Attorney General.

Jurisdiction plainly lies in the District Court to review the exercise of discretion where, as here, the issue is whether the Secretary of Defense has relied upon the proper legal criteria for the exercise of his discretion, and where, as *alleged* here, the exercise of discretion by the Secretary of Defense has been preempted by the Agency for International Development by reason of an Interagency Agreement, and by the Viet Namese Government by reason of deference to its wishes. The first issue poses a legal question, always resolvable by the courts; the second issue presents an allegation of abuse of discretion which is determinable by the courts upon proof.

If any doubt were to exist as to the correctness of the District Court's denial of appellant's motion to dismiss, none whatever can be entertained regarding the denial of appellant's motion for summary judgment. Without a responsive answer below, the appellant chose to file in support of his motion for summary judgment a mass of unverified, unsubstantiated comments and statements regarding the appellee's qualifications ranging from his relationships with his wife, teachers, creditors and former employers to the ambivalent desire of the Viet Namese Government to place the appellee

in the army and to return him to school-teaching. A genuine issue of material fact thus is posed as to the true basis of the decision of the Department of Defense. The rule is plain and the application universal that in such a circumstance, even where allegations are made that the Secretary of Defense has abused his discretion, the "issue requires the illumination of an evidentiary hearing."

ARGUMENT

I.

The Determination of the Secretary of Defense Not To Request a Waiver of the Two Year Residence Requirement for Appellee Is Subject to Judicial Review

Overseas Media Corp. v. McNamara, __ U.S. App. D.C. __, 385 F.2d 308 (1967) suffices to dispose of appellant's contention here, as there, that the Administrative Procedure Act, 5 U.S.C. 1009, bars judicial review of discretionary acts of the Secretary of Defense. Indeed, appellant concedes as much when he refers in his brief (footnote 10, page 19) to the "unimpeachable proposition that the fact that action is initially delegated to an agency's discretion will not foreclose the courts from review of the exercise of that discretion for an abuse." See *Dismuke v. United States*, 297 U.S. 167, 172-173 (1935); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Fong v. Brownell*, 94 U.S. App. D.C. 323, 215 F.2d 683 (1954); and as to the availability of judicial review of the discretion exercised under the specific statute involved here, 8 U.S.C. 1182(e), see especially *Talavera v. Pederson*, 334 F.2d 52 (6th Cir. 1964); *Mendez v. Major*, 340 F.2d 128 (8th Cir. 1965); *Velasco and Morales v. Immigration and Naturalization Service*, 386 F.2d 283 (7th Cir. 1967); and *Glorioso and Colinco v. Immigration and Naturalization Service*, 386 F.2d 664 (7th Cir. 1967).

An abuse of discretion has been alleged below. It is that the Secretary of Defense failed to exercise his independent discretion to determine, as 22 C.F.R. 63.6(d) contemplates

(see Appellant's Brief, p. 12), whether appellee's two year foreign residence would be "clearly detrimental to a program or activity of official interest" to the Department of Defense. Instead, the complaint alleges, the Secretary of Defense bound himself to a decision made by the Agency for International Development and to one intended to be made by the Secretary of State. See 22 C.F.R. 63.7, which reposes in the Secretary of State the power to "review the policy, program and foreign relations aspects of the case" and where appropriate to "transmit his recommendation to the Attorney General" for final action. *Accardi v. Shaughnessy*, op cit., 347 U.S. 260 (1954), establishes that such an allegation states a cause of action and that such a cause of action is subject to judicial review. Similarly, see also *Wilson v. United States*, __ U.S. App. D.C. __, 369 F.2d 198, 200 where in language applicable here, this Court observed, "We are not reviewing an exercise of discretion by a public officer, but rather determining whether the governing statute allows or requires that discretion be exercised."

II.

Appellee Has a Direct and Substantial Personal Interest in the Outcome and Has Standing To Sue

Appellant suggests that the appellee has no standing to sue because he has "no legal rights" which have been "invaded" or "threatened." This criterion, of course, is not the one by which standing is determined. *Chicago v. Atchison, Topeka and Santa Fe Railway*, 357 U.S. 55, 83 (1958) holds:

> "It is enough, for purposes of standing, that we have an actual controversy before us in which (the plaintiff) has a direct and substantial personal interest in the outcome."

Such an interest, it need not be said, appears here.

Appellant's attempt to distinguish *Talavera v. Pederson*, op. cit., 334 F.2d 52 (6th Cir. 1964); and *Mendez v. Major*, op. cit., 340 F.2d 128 (8th Cir. 1965), from the action here

(Brief, p. 22) is without merit. 8 U.S.C. 1182(e) provides that whether the waiver is requested by an "interested United States Government agency" or by the "Commissioner of Immigration and Naturalization," there must be in either case, a finding by the Attorney General that the waiver is in the "public interest." Nor is the hardship waiver "for the benefit of the exchange visitor," as appellant urges; it is for the benefit of the exchange "alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien)." 8 U.S.C. 1182(e). No statutory distinction therefore exists between waivers which are "requested" by an "interested United States Government agency" or those "requested" by the Commissioner of Immigration and Naturalization.

Thus the decisions of the Sixth, Seventh, and Eighth Circuits which have held that exchange visitors have standing to sue upon complaints that they have been denied foreign residence waivers, and that the courts have jurisdiction to review such complaints, establish beyond question that the District Court below was correct in denying the appellant's motion to dismiss the complaint for lack of jurisdiction and for failure to state a cause of action.

III.

Denial of Summary Judgment Was Proper

Appellant would have this Court hold that he was entitled to summary judgment below, without having filed an answer to the complaint, upon a "record" which is not a record within the meaning of the Administrative Procedure Act, without a transcript of any administrative proceedings, with a collection of miscellaneous papers, some relevant, some not, some legible to third persons and some not, with reference to unidentified sources of information described in the appellant's brief (page 29) as "expert," where genuine issues of material fact have been raised in the Statements of Material Facts filed by the parties below, without the opportunity of the appellee to establish his claim in any manner

before the administrative decision, whether by letter, interview, telephone conversation, or by hearing before an administrative agency or a judicial tribunal.

As the appellant has said (Brief, p. 29), the procedures are "informal"; it cannot be said that they are "fair and thorough" when the appellee was given no notice and no opportunity to rebut the miscellaneous array of information gathered against him. The exhibits filed by the appellant establish that none of the adverse information was disclosed to the appellee at any time until the motion for summary judgment below, that no opportunity has been had to determine the truth of the allegations; yet appellant relies upon various allegations set forth in his exhibits and contained in the Joint Appendix (J.A. 59-72) in this Court (Brief, pp. 3-4) to secure in effect a summary judgment here.

If these allegations are relevant, as appellant seeks to make them, the holding in *Overseas Media Corporation v. McNamara,* op. cit., ___ U.S. App. D.C. ___, 385 F.2d 308 (1967) would seem dispositive of appellant's attempt to secure a summary judgment: ". . .A proper resolution of this issue requires the illumination of an evidentiary hearing" . . . . [the claimants] . . . "are entitled to have [their] claim considered by the District Court after the facts have been established in an adversary hearing." (At 316).

Apart from the propriety of granting the appellant a summary judgment at this posture of the case, appellant has not established as a matter of law that he is entitled to a judgment. As he states, the "gravamen of plaintiff's (appellee's) complaint here is that the Defense Department acted unreasonably [that is, contrary to the provisions of the statute] in relying upon determinations by AID and South Viet Nam . . ." (Brief, p. 28).

The statute, 8 U.S.C. 1182(e), contemplates a tripartite exercise of discretion for the grant of waivers of foreign residence in order to permit exchange visitors to acquire permanent residence in the United States. First, there must be a "request of an interested Government agency," or, as to

an exchange visitor whose departure would impose hardship upon a lawful resident or citizen spouse or child, by the Commissioner of Immigration and Naturalization. Second, there must be a favorable recommendation by the Secretary of State. Third, there must be a finding by the Attorney General, the officer in whom the ultimate decision is reposed, that the waiver is in the public interest.

As the legislative history cited by appellant (Brief, p. 9) establishes, the waiver provision was designed in Senator Fulbright's words, 102 Cong. Rec. 5019, to deal with "individual cases in which the exceptional talents of the exchange visitor are so greatly needed by our Government as to warrant treatment other than that indicated in ordinary cases."

The determination of need by the Government has been vested by regulation in the "interested Government agency." Thus, the Department of Health, Education and Welfare, which is the only agency with published regulations governing the procedures in exchange visitors cases, enumerates three criteria for determining requests: (45 C.F.R. 50.3)

> "(a) The individual must be in a high priority program or activity of national or international significance involving the broad interests of the general public . . .
>
> "(b) A direct relationship must exist between the exchange visitor and the program or activity involved so that loss of his services would necessitate discontinuance of the program . . .
>
> "(c) The individual must possess unique and outstanding qualifications, training, and experience, and be making original and significant contributions to the program."

Significantly, HEW, whose program the appellant informs us (Brief, p. 11), "handles more applications than any other agency" and is "regarded by the Department of State as 'excellent and professional'", omitted in its regulations any determination of "policy, program, and foreign relations

aspects of the case."[1] That function is vested by 22 C.F.R. 63.7 in the Secretary of State.

By contrast, the Department of Defense Policy on Waiver Requests (J.A. 32-35) and the Interagency Agreement (J.A. 80-85) merge the decision-making function of the requesting agency with that of the Secretary of State, and, by the requirement for a clearance from the sponsoring agency, with that of the AID.

The blurring of the decision making process has divested the Secretary of Defense of his independent role to determine whether his department should become an "interested government agency" for the purpose of making a request to the Secretary of State. The result has been to deprive the appellee of the opportunity to have the application for a foreign residence waiver considered by the Secretary of State in the light of the services which the appellant can perform for the United States Government in the conduct of the Viet Namese War.

In effect, the application for a waiver of the residence requirement for the appellant has been decided by the AID and the Viet Namese Government because of the binding consideration given to their opposition to the waiver. This is in conflict with the plain scheme of the statute. *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), makes it clear that it is the appellee, not appellant, who is entitled to judgment.

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[1] In March, 1965, HEW entered into the Interagency Agency Agreement (J.A. 80-85) which expanded the criteria for its determination of exchange visitor waiver requests and which is in issue here.

CONCLUSION

For the reasons advanced above, appellee urges that the Orders below to deny the appellant's motion to dismiss, or alternatively, for summary judgment, should each be affirmed.

Respectfully submitted,

David Carliner

902 Warner Building
Washington, D.C. 20004

Attorney for Appellee